Canada. Justice, Dept. of
Memorandum on the office of Lieutenant-Governor of a province ... 1955.

MEMORANDUM

ON THE

OFFICE OF LIEUTENANT-GOVERNOR OF A PROVINCE: ITS CONSTITUTIONAL CHARACTER AND FUNCTIONS

(WITH APPENDICES)

MARCH, 1955
DEPARTMENT OF JUSTICE
OTTAWA

I

THE OFFICE OF THE LIEUTENANT-GOVERNOR AND THE BRITISH NORTH AMERICA ACT, 1867

PRIOR to Confederation the authority of the Crown was represented, and monarchial functions were discharged, in the British North American colonies by a Governor or Lieutenant-Governor. This officer was nominated to his office by the Sovereign-in-Council and appointed by letters patent under the Great Seal. His jurisdiction and powers were defined by the terms of his commission and, in further detail, by the royal instructions that accompanied it. It is noteworthy that the study of these commissions and instructions issued to the Governors prior to the *British North America Act* is the study of the development of the constitutional law of Canada. Although they varied from Governor to Governor (1), the later commissions and instructions empowered the Governor to exercise such royal prerogatives as the assembling, proroguing and dissolving of the colonial legislatures; the power of disallowance of offensive local bills, the authority to establish courts of justice; the authority to pardon criminal offenders within his jurisdiction. They also contained a wide grant of legislative power. Further, by these royal instruments, the Governor could enact measures concerning militia and defence; he had control over all moneys to be expended for the public service and the disposition of Crown lands (2).

He was not a viceroy; unlimited sovereign power was not delegated to him. The Judicial Committee of the Privy Council has said:

> It is apparent from these authorities that the Governor of a Colony (in ordinary cases) cannot be regarded as a viceroy; nor can it be assumed that he possesses the general sovereign power. His authority is derived from his commission, and limited to the powers thereby expressly or impliedly entrusted to him. Let it be granted that, for acts done by a Governor under and within the limits of his commission, he is protected, because in doing them he is the servant of the Crown, and is exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of state (3).

Again, in *Cameron v. Kyte* (4), the Judicial Committee of the Privy Council held that "The Governor of a Colony has not, by virtue of his appointment, the sovereign authority delegated to him, and an act done by him on his own authority, unauthorized either by his commission, or expressly or impliedly by any instructions, is not equivalent to such an act done by the Crown itself." Thus, a Governor was not exempt from civil suit and was liable for actions done in his private capacity. Also, he could be sued in respect of any official action that could be made out to be a tort. To assert a plea of act of state, he must show an express or implied authority for the commission of the act.

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(1) Many of these early commissions and instructions may be found in *Can. Sess. Pap.*, 1883, No. 70; 1906, No. 18.

(2) See Todd, *Parliamentary Government in the British Colonies*, 2nd ed., 1894, at pp. 34ff.

(3) *Musgrave* v. *Pulido* (1879) 5 App. Cas. 102, at p. 111.

(4) (1835) 3 Knapp 332; 12 E.R. 678.

It would follow that the Governor of a colony could not exercise all the prerogatives of the Crown, but only such as were expressly or impliedly included within the scope of the commission and instruction (5). These never included many of the major prerogative powers. For instance, respecting the prerogative right of appeal to the Crown, Todd says that "the judicial prerogative of the Crown or the right of determining in the last resort all controversies between subjects in every part of the Empire, has been universally reserved, as being one of the most stable safeguards, and most beneficial acts of the sovereign power" (6). Also the Crown's prerogative powers of mercy have either been reserved to the Crown or made the subject of a restricted delegation to the colonial Governors. The most jealously guarded prerogatives of the Crown were those involving relations with foreign states. Thus, such powers as declaring war, entering into treaties, sending and receiving diplomatic agents, were never delegated to the Governors, but reserved to the Crown.

The position of the Crown in colonial government is aptly expressed by an eminent Canadian jurist:

> The Crown was an integral part of the system and, fundamentally, the provinces were limited monarchies. The governor acted in the name of, on behalf of and subject to the instructions of the Crown. The Crown was a part of the legislature, notwithstanding the formal difference in the style of enactment between the prerogative and the statutory constitutions. The Crown was the fountain of justice; the courts were the royal courts; process issued in the King's name; and, in the field of public law, proceedings were in the name of the Crown. Revenues were the Crown's revenues; royalties enured to the Crown; the Crown was the owner of the public domain and the lord paramount of all lands; and private titles to land were derived from Crown grants (7).

Having briefly considered the position of colonial Governors in British constitutional law, the position of the provincial Lieutenant-Governor under the express provisions of the *British North America Act, 1867*, may now be examined. Although, after 1867, in some aspects, his position may be compared with that of a colonial Governor, it will be apparent from the following pages that the office of the Lieutenant-Governor owes its existence, and most of its functions and incidents, to the provisions of the *British North America Act*. The sections of the Act pertaining to the office of the Lieutenant-Governor are contained in Appendix A.

By section 58 the Lieutenant-Governor for each province is appointed by the Governor General in Council by instrument under the Great Seal of Canada and, by section 67, the Governor General in Council is likewise empowered to appoint an administrator to execute the office and functions of the Lieutenant-Governor during his absence, illness or other inability. On appointment he is issued a commission (8), which authorizes him to perform and execute his several functions according to the provisions of the *British North America Act, 1867*, and "of all other statutes in that behalf and....according to such instructions as are

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(5) Todd, *ibid*, at p. 36. But as Keith says, ". . . apart from the statutory powers, the Governor has a delegation of so much of the executive power as enables him to effectively conduct the Executive Government of the territory. The legal instruments are vague but general." *Responsible Government in the Dominions* (2nd ed., 1928), Vol. 1, at p. 84.

(6) *Ibid*, at p. 40.

(7) J. E. Read, "*Early Provincial Constitutions*" (1948), 26 Can. B. R. at p. 636.

(8) See Appendix B.

herewith given to you and hereunto annexed or which may from time to time be given to you . . . under the sign manual of Our Governor General of Canada or by Order of Our Privy Council for Canada." It seems, however, that though the commission expressly refers to instructions accompanying it, no instructions were, in point of fact, annexed to the commission of a Lieutenant-Governor until 1892. This omission having been brought to his attention, His Excellency the Governor General, by Order dated 16th June, 1892 (P.C. 1574), approved of a general form of Instructions to be given to Lieutenant-Governors of the several provinces at the time of their appointment. These Instructions, together with an amendment to Article V (Order dated July 19th, 1950, P.C. 343) may be found in Appendix C.

Section 55, read in conjunction with section 90, reserves the power in the Lieutenant-Governor to assent to, withhold assent to or reserve bills of the local legislature. He shall declare "according to his discretion, but subject to the provisions of this Act and to the Governor General's instructions, either that he assents thereto in the Governor General's name, or that he withholds the Governor General's assent, or that he reserves the bill for the signification of the Governor General's pleasure." By section 56, if an Act is disallowed by the Governor General, the Lieutenant-Governor is to signify, by speech or message to the legislature, or by proclamation, the fact of such disallowance, and the Act is annulled from and after the day of such signification. Similarly, by section 57, a bill reserved by the Lieutenant-Governor for the signification of the Governor General's pleasure does not have any force unless and until within one year from the day on which it was presented to the Lieutenant-Governor for the Governor General's assent the Lieutenant-Governor signifies, by speech, message or proclamation, that it has received the assent of the Governor General.

Section 59 provides that the Lieutenant-Governor holds office during the pleasure of the Governor General, subject, however, to the express condition that no Lieutenant-Governor "shall be removable within five years from his appointment, except for cause assigned, which shall be communicated to him in writing within one month after the order for his removal is made," and shall also be communicated by message within one week thereafter to both Houses of the Parliament if then sitting, and, if not, then within one week after commencement of the next session of Parliament.

The removal of His Honour Luc Letellier, Lieutenant-Governor of the Province of Quebec, is the only instance of the interposition of Federal authority in this respect before the expiration of the normal term (9). Mr. Letellier had dismissed his ministers on the grounds that they had acted contrary to his representations; were encouraging a lavish expenditure in regard to railways; and had promoted a bill that he deemed to be an arbitrary and illegal infringement of vested rights. Although the reasons for the removal of the Lieutenant-Governor have been criticized, there is no doubt that, as Todd says,

> the responsibility which, under the *British North America Act*, a lieutenant-governor incurs to the governor-general in council renders him amenable to the dominion government for his conduct in office; and that, upon all

(9) See Todd, *Parliamentary Government in the British Colonies*, at pp. 601ff. See also *Can. Sess. Pap.*, 1879, No. 19; 1880, No. 18.

needful occasions, that government may interpose either to correct irregularities, to counsel in emergencies, or, if necessary, to remove an incompetent or untrustworthy governor, before the expiration of his ordinary term of service.

The precedent is not only important from the point of view of responsibility to the authority that has appointed him but also in regard to the constitutional position of the Lieutenant-Governor. Briefly, the position of this officer is analogous to that of the Governor General in Canada and the Sovereign in the United Kingdom. Like his more august counterparts in Canada and the United Kingdom, it is his normal duty to accept the advice of the ministers having the confidence of the legislature. On the other hand, the right of the Lieutenant-Governor to dismiss his ministers when he has ceased to have confidence in them would appear "unquestionable". Sir M. Hicks-Beach, Secretary of State for the Colonies, in a despatch dated July 3rd, 1879, conveyed to the Marquis of Lorne the conclusions of Her Majesty's Government, upon his request for instructions in regard to the Letellier matter:

> There can be no doubt that the lieutenant-governor of a province has an unquestionable constitutional right to dismiss his ministers, if, from any cause, he feels it incumbent upon him to do so. In the exercise of this right, as of any other of his functions, he should of course maintain the impartiality towards rival political parties which is essential to the proper performance of the duties of his office; and, for any action he may take, he is (under the fifty-ninth section of the *British North America Act*) directly responsible to the governor-general.

A particular problem may arise concerning a refusal to accept ministerial advice when the ministry requests a dissolution after it is defeated in the legislature or when it is no longer sure of its majority. The practice in this regard would appear clear. A dissolution may be refused by a Lieutenant-Governor if he is satisfied that there is an alternative government in prospect that can and will accept full responsibility for his decision. His discretion to refuse a dissolution should, however, be exercised only when it is certain that there is an alternatve government that will be supported in the legislature (10). It is the duty of the Lieutenant-Governor to seek impartially to obtain a government in accordance with the wishes of the electorate. It is the duty of the members of the legislature to endeavour to form such a government.

Other sections of the *British North America Act, 1867,* are to be briefly noted in defining the place of the Lieutenant-Governors in our constitutional system. Section 60 provides that their salaries shall be fixed and provided by the Parliament of Canada. Section 61 provides that a Lieutenant-Governor shall take oaths of allegiance and office similar to those taken by the Governor General (11). Section 92(1) enables the provincial legislatures to amend the provincial constitution "except as regards the Office of Lieutenant-Governor."

Section 63, 64 and 65 concern the executive power in the provincial constitutions. Section 63 enacts that the "Executive Council of Ontario and Quebec shall be composed of such persons as the Lieutenant-Governor from time to time thinks fit . . ." As the provinces of Nova Scotia and

(10) See Jennings, *Cabinet Government* (1937) at pp. 317-18. Todd, *Parliamentary Government in the British Colonies,* at pp. 760-61. Keith, *The British Cabinet System,* 1830-1938, (1939) at pp. 393, 395-6.

(11) For form of oath see *Can. Sess. Pap.* 1884, No. 77.

New Brunswick were already in existence at the date of Confederation, section 64 merely provided that their executive authorities were to continue as they existed at the time of Union until altered under the authority of the *British North America Act*. Section 65 authorizes the Lieutenant-Governor to exercise "all powers, authorities, and functions . . . under any Act . . . vested in or exercisable by the respective Governors or Lieutenant-Governors of those provinces . . . " prior to Confederation. As Todd says:

> This constitutes and empowers the Lieutenant-Governors to be the appropriate channels to represent and administer the authority of the Crown in their several provinces; and to convey, through subordinate functionaries, that authority in all matters wherein it is necessary for the Crown to act through the provincial executive (12).

He continues and says that the words of section 65

> unmistakeably show that the Imperial parliament has ratified and enjoined a continuance of the exercise of executive power in the various provinces of the Dominion, in accordance with the usages of responsible government; and that it contemplates that the lieutenant-governors therein should occupy, towards their executive council and towards the local legislature, the identical relation occupied by the governor-general in Canada and by the Queen in the United Kingdom towards their several privy councils and parliament (13).

It will be noted that there is nothing in this section concerning the executive power in Nova Scotia and New Brunswick, but as Ritchie, C.J., noted in *Mercer v. Attorney General of Canada* (14):

> As the executive governments of Nova Scotia and New Brunswick were continued these provisions were not necessary as to those provinces, but these various enactments and the continuance of the executive governments of Nova Scotia and New Brunswick very clearly show that the provincial executive power and authority was to be precisely the same after as before confederation. That whatever executive powers could be exercised or administrative act done in relation to the Government of the provinces respectively by the Lieutenant Governor of a province before confederation can be exercised or done by Lieutenant Governors since confederation, subject, of course, to the provisions of the Act, as is said, in reference to Nova Scotia and New Brunswick, and is expressed in reference to Ontario and Quebec "as far as the same are capable of being exercised after the Union". That is to say, that the executive government of the provinces, as exercised by the Lieutenant Governors and Executive Councils, until altered by the respective legislatures, continue as before confederation, except so far as the executive powers of the Governor General over the Dominion of Canada may interfere.

There are other provisions in the *British North America Act* relative to the office of the Lieutenant-Governors in the different provinces due to the creation of the new provinces of Quebec and Ontario in 1867. Thus sections 69 and 71 enact that the Lieutenant-Governor is to be a component part of the legislature of Ontario and Quebec respectively. Sections 72 and 82 preserve to the Lieutenant-Governors the prerogative powers of appointing members to the legislative council of Quebec and of summoning the legislative assemblies of the provinces of Ontario and Quebec. Section 88 continues the constitutions of the provinces of Nova Scotia and New Brunswick until altered by the authority of the Act.

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(12) *Parliamentary Government in the British Colonies*, at p. 590.
(13) *Ibid*, at pp. 591-92.
(14) (1881) 5 S.C.R. 538, at pp. 636-7.

II

VIEWS AS TO THE CHARACTER OF THE OFFICE PRIOR TO 1892

For a period of some twenty-five years following Confederation, there was divergence of opinion amongst statesmen as well as judges respecting the true legal status of the office of the Lieutenant-Governor. This divergence of opinion may, no doubt, be largely ascribed to misconceptions springing from the fact that Lieutenant-Governors were not directly appointed by the Sovereign, but received their appointments from the Governor General in Council. It may also have been due, to some extent, to the influence of Sir John Macdonald, whose preference for a legislative, rather than a federal, union was well known and who was disposed to look upon the provinces as being little more than glorified municipal institutions (15). As indicating the temper of his views towards the provinces, the following extract from a letter dated October 26, 1868, from Sir John Macdonald to Brown Chamberlain, M.P., is illuminating:

> My own opinion is that the Central Government or Parliament should pay no more regard to the status or position of the Local Government than they would to the prospects of the ruling party in the Corporation of Quebec or Montreal. So long as the dual system exists, a certain sympathy will also exist. This was beneficial at the commencement of matters and should be kept up, at all events for this parliament, until the new constitution shall have stiffened in the mould (16).

The position of the Lieutenant-Governor in the early stages of the Union is illustrated by references to opinions of statesmen of the period and judicial expressions on point. They are consistent in the view that the position of Lieutenant-Governors was quite different from the colonial governors.

In correspondence with the Imperial authorities regarding the exercise of the prerogative of pardon by the Lieutenant-Governors, Sir John A. Macdonald referred to objection on the part of the Imperial authorities to the 44th Resolution of the Quebec Conference enabling the Lieutenant-Governor to exercise this power. Mr. Cardwell, in 1864, (then Secretary of State for the Colonies) stated that:

> It appears to Her Majesty's Government that this duty belongs to the Representative of the Sovereign, and could not with propriety be devolved upon the Lieutenant-Governors, who will, under the present scheme, be appointed, not directly by the Crown, but by the Central Government of the United Provinces.

The objectionable clause was omitted and "this omission was made for the avowed purpose of confining the exercise of the pardoning power to Her Majesty's Representative holding Her Majesty's direct authority for its exercise, and if it is now held that such power is vested in the Lieutenant-Governors appointed since the Union, the intention of Her

(15) *Correspondence of Sir John Macdonald, 1840-1891*, by Sir Joseph Pope, at p. 11, note 1.

(16) *Correspondence of Sir John Macdonald, 1840-1891*, by Sir Joseph Pope, at p. 75.

Majesty's Government will have been thwarted" (17). On the same matter Earl Granville, Secretary of State for the Colonies said in a despatch in 1869 to Sir J. Young, then Governor General:

> It is true, that before the passing of this Act the power of pardoning was vested in the Lieutenant-Governors of the several Provinces; but that power was withdrawn not only by the revocation of the Letters Patent by which it was conferred, but also, as I am advised, by the Queen's Act in assenting to the *British North America Act*, by which Act the authorities given to the several Provincial Lieutenant-Governors were revoked, except so far as is otherwise therein provided. Among the revoked powers the power of pardoning would be one; unless specially excepted.
>
> Now the Lieutenant-Governors of the Provinces under the new system are to be appointed not directly by the Queen, but by the Governor General in Council, and the new Lieutenant-Governors would not take the power of pardoning *virtute officii* unless it were so given them by the Act.
>
> The whole constitution of the Provinces was changed by the Act of Union, and the delegated Powers of Government necessarily ceased (18).

An early despatch by the Duke of Buckingham and Chandos to Viscount Monck, the Governor General in 1868, is another indication of the different and inferior position that the Imperial authorities considered the Lieutenant-Governor now to hold. He wrote:

> My Lord,—I have under my consideration your Lordship's despatch, No. 170, of the 9th of September, submitting the question whether the Lieutenant Governors of the provinces within the Dominion of Canada are entitled to salutes from H.M. ships and fortifications within their respective provinces.
>
> I have the honour to acquaint you that under the circumstances of the case, the Lieutenant-Governors of the provinces holding their commissions from the Governor General, will not be entitled to salutes.
>
> I have the honour to be, etc., etc. (19).

A little later, in a despatch dated November 7, 1872, to the Governor General of Canada, the Colonial Secretary (the Earl of Kimberley) was of the opinion:

> And with reference to the question asked by Sir Hastings Doyle, and submitted by Lord Lisgar for my decision, namely, "whether the Lieutenant-Governors are supposed to be acting on behalf of the Queen", I have to observe that while from the nature of their appointment they represent on ordinary occasions the Dominion Government, there are nevertheless occasions (such as the opening or closing of a session of the Provincial Legislature, the celebrations of Her Majesty's Birthday, the holding of a levee, etc., etc.), on which they should be deemed to be acting on behalf of Her Majesty, and the first part of the National Anthem should be played in their Presence (20).

Further, Earl Carnarvon, Secretary of State for the Colonies, in a despatch of January 7, 1875, to the Governor General of Canada, said:

> The Lieutenant-Governors of the Provinces of the Dominion, however important their functions may be, are a part of the Colonial Administrative Staff, and are more immediately responsible to the Governor General in Council. They do not hold Commissions from the Crown, and neither in power or privilege resemble those Governors or even Lieutenant-Governors

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(17) *Can. Sess. Pap.*, 1869, No. 16, p. 2.

(18) *Ibid*, at p. 5.

(19) Quoted by Taschereau, J., in *Mercer* v. *Attorney General of Ontario*, (1881) 5 S.C.R. at p. 672.

(20) *Ont. Sess. Pap.*, 1873, No. 67. Also quoted by Taschereau, J., *ibid*, at p. 672.

> of Colonies to whom, after special consideration of a personal fitness, the Queen under the Great Seal and her own hand and signet delegates portions of her prerogatives and issues her own instructions (21).

Similarly, in a report to the Governor General in Council, approved by order of April 1, 1875, the then Minister of Justice, the Honourable T. Fournier denied any relationship between the Lieutenant-Governors and the Queen respecting the enactment of legislation when he said:

> The Queen not being in any way an enacting party or power of such a Legislature, Her Majesty's name is improperly used in the provincial legislation (22).

These opinions of high political officers at the time of Confederation clearly indicate that Lieutenant-Governors, except in a very limited way, did not directly represent the Sovereign in the provinces. They were viewed essentially as Federal officers, responsible and subordinate to the Governor General in Council. Most judicial opinions of this period are in accord with the views of the statesmen. For the most part they are self-explanatory and are set out below without comment. Although they may now be considered overruled in respect of such holdings as that the Lieutenant-Governors are not representatives of the Crown and that the Sovereign does not form part of the local legislatures, they still, quite probably, have force for other purposes (23).

One of the first judicial decisions to consider the legal status of the Lieutenant-Governor was *Regina v. Amer* (24). The question to be decided was whether the Lieutenant-Governor of Ontario could, under the prerogative powers, issue commissions for the holding of special courts. In determining where the prerogative power resides after the passing of

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(21) *Can. Sess. Pap.*, 1875, No. 11, p. 38.

(22) *Dominion and Provincial Legislation*, 1867-1895, p. 120. See also Henry and Taschereau, JJ., in *Lenoir* v. *Ritchie* (1879) 3 S.C.R. 575, at pp. 613, 623, quoted on p. 9 *infra*. Also Ramsay, J., in *ex parte Dansereau*, (1875) 19 L.C.J. 210, at p. 215 where he says:

> "They are markedly called legislatures in contradistinction to Parliament. The Queen forms no part of these Legislatures, although through her representative the Governor General she appoints Lieutenant-Governors; and I take it she could not in her own person sanction a bill of a local legislature, although she names the officer who shall perform the duty." As will be seen, this is now incorrect and the Queen is as much part of the provincial legislature as she is part of the Canadian Parliament acting through her representative. It is to be noted that the provinces of Newfoundland, Nova Scotia and Prince Edward Island enact bills in the name of the Lieutenant-Governor and the Assembly whereas the remaining provinces enact in the name of Her Majesty. It would appear that either practice is correct or, at least, the legal validity of enactments are unaffected by the form. The observations of Todd respecting assent to bills (*Parliamentary Government in the British Colonies*), at p. 439-40, would be relevant when he says: "That inasmuch as the act empowers 'the lieutenant-governor' of each province, 'in the Queen's name, by instrument under the great seal of the province', to 'summon and call together' the provincial legislature, and as it is a well-understood principle that all parliaments, whether federal or provincial, are opened in the Queen's name, and by her governors; and that 'legislation is carried on in her name even in provinces, as in Canada, which are directly subordinate to a federal government, instead of to Imperial authority', it necessarily follows that the constitutional practice which for the most part prevails in the several provinces of the dominion, whereby the lieutenant-governor assents to or withholds his assent from bills passed by the provincial legislature, 'in Her Majesty's name', is correct . . ." Mr. Todd's conclusion was adopted by Crockett, J., *In re Reference Powers of Disallowance and Reservation* (1938) S.C.R. 71, at p. 85. All the judges considered that assent to bills either in the name of the Governor General or the Sovereign was a matter of form which did not affect the "law governing the matters". The reasoning would probably apply to the form of provincial enactments.

(23) See IV, *infra*.

(24) (1877) 42 U.C.Q.B. 391 at pp. 407-8.

the *British North America Act,* Harrison, C.J., referred to section 9 whereby the executive government and authority of and over Canada "is hereby declared to continue and be vested in the Queen". He says that the "power being a prerogative one, can only be exercised by the Queen or her representative. The Governor General of Canada is the only executive officer provided for by the Act who answers this description".

Shortly after, the position of the Lieutenant-Governor was discussed in considerable detail in *Lenoir v. Ritchie* (25). In this case, the Lieutenant-Governor had been authorized by an Act to appoint Queen's Counsel and to grant to any member of the bar a patent of precedence in the courts of the province of Nova Scotia. It was argued, *inter alia,* that as the royal assent had been given to the Act, it must be taken as a legislative declaration of the waiver and transference of the Sovereign's functions and that the Lieutenant-Governor had been invested with the royal prerogative power of granting honours. Henry, J., in answer, said (26):

> The argument of this question, however, is unavailable, for the Queen has not signified her assent to the Local Act in question. By the provisions of section 90 of the Imperial Act the Governor General, and not the Queen, assents to Local Acts made in his name as provided. The Lieutenant-Governors are appointed not by the Queen, but by the Governor General in Council. It cannot, therefore, be successfully contended that the Queen has assented to the Local Act in question; nor can it be with greater success contended that by assenting to it the Governor General had any power in doing so to interfere with the royal prerogative in question.

Mr. Justice Taschereau also answers the question (27)

> I really do not see on what the appellants can rely to support the contention that Her Majesty has sanctioned the Act now under consideration. It seems to me that the theory that the Queen is bound by certain statutes because she is a party thereto can have no application whatever to the Provincial statutes. In the Federal Parliament, the laws are enacted by the Queen, by and with the advice and consent of the Senate and the House of Commons. Not so in the Provinces. Their laws are enacted by the Lieutenant-Governors and the legislatures. The Governor General is appointed under the Royal Sign-Manual and Signet; the Lieutenant Governors are not even named by the Governor General but by the Governor General in Council. They are officers of the Dominion Government. Their office, as the heads of the Provinces, is a very high and a very honourable one indeed, but they are not Her Majesty's representatives, at least *quo ad* the matter now under consideration, and so as to bind Her Majesty in any matter not left exclusively under the Provincial control by the *British North America Act.* I mean that, admitting the theory that the Provincial laws must be held to be enacted in Her Majesty's name, and I need not consider how far this may be admissible, this can be so only when such laws are strictly within the powers conceded to the Provincial Legislatures by the Imperial Act.

Justice Gwynne, in the same case, is concerned with the question whether the *British North America Act,* either expressly or by necessary inference, divests Her Majesty of the prerogative to make such appointments and confer rank and precedence, when he said (28):

> By this Act, which is the sole Constitutional Charter of the Dominion of Canada and of the respective Provinces constituting the Confederation, Her Majesty expressly retains all Her Imperial rights, as the sole and supreme executive authority of the Dominion, and her position as an integral

(25) (1879) 3 S.C.R. 575.
(26) *Ibid,* at p. 613.
(27) *Ibid,* at p. 623.
(28) *Ibid,* at p. 634.

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part of the Dominion Parliament. The Dominion of Canada is constituted a *quasi* imperial power, in which Her Majesty retains all her executive and legislative authority in all matters not placed under the executive control of the provincial authorities, in the same manner as she does in the British Isles; while the Provincial Governments are, as it were, carved out of and subordinated to, the Dominion. The head of their executive Government is not an officer appointed by Her Majesty, or holding any commission from her, or in any manner personally representing her, but an officer of the Dominion Government, appointed by the Governor General, acting under the advice of a council, which the act constitutes the Privy Council of Canada. The Queen forms no part of the Provincial Legislatures, as she does of the Dominion Parliament. The Provincial Legislatures consist in some Provinces of such subordinate executive officer and of a Legislative Assembly, and in others of such executive officer and of a Legislative Council and Assembly.

A number of important opinions respecting the position of the Lieutenant-Governor were forthcoming in *Mercer v. Attorney General of Canada* (29), in the Supreme Court of Canada. The question that came on appeal from the Court of Appeal of Ontario was whether the prerogative right of escheat was in the Crown in right of Canada or in right of Ontario. In answering the argument that the Queen forms part of the legislatures of the provinces, Taschereau, J., said that this had not been denied by the appellant. But he continues (30):

> But they are not Her Majesty's direct representative as the Governor General is. They have never been considered as such by the Imperial authorities.

He then quotes a number of despatches in which the Imperial authorities commented on the position of the Lieutenant-Governor (31). He continues (32):

> I do not cite these documents as conclusive evidence for a court of justice, but as worthy consideration, and to show that the Imperial authorities and Her Majesty herself consider the Lieutenant-Governors as not generally representing the sovereign.

Mr. Justice Gwynne says that the Act clearly expresses the plain intent of the framers (33)

> . . . to constitute within that national power so constituted and called the "Dominion of Canada" certain subordinate bodies called provinces having jurisdiction exclusive though not "Sovereign" over matters specially assigned to them of a purely local, municipal and private character, to which provinces, by reason of their jurisdiction being so limited, were given constitutions of an almost purely democratic character, of whose legislatures Her Majesty does not, as she does of the Dominion, and as she did of the old provinces, constitute a component part, and to the validity of those Acts, the Act which constitutes their charter does not even contemplate the assent of Her Majesty as necessary. The jurisdiction conferred on these bodies being purely of a local, municipal, private and domestic character, no such intervention of the Sovereign consent was deemed necessary or appropriate, so likewise the power of disallowing Acts of the provincial legislatures is no longer, as it was under the old constitution of the provinces, vested in Her Majesty, but in the Governor General of the Dominion in Council, and this is for the purpose of enabling the authorities of the Dominion to exercise that branch of sovereign power formerly exercised by Her Majesty in right of her prerogative royal. . . .

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(29) (1881) 5 S.C.R. 538.
(30) *Ibid*, at p. 670.
(31) *Supra*, at pp. 13, 14.
(32) (1881) 5 S.C.R. 538 at p. 673.
(33) *Ibid*, at pp. 711-12.

These judicial pronouncements, and others (34), that the Lieutenant-Governor is not the Sovereign's representative in the provinces or, at the most, only in a limited sense, predominate the judicial opinion in the period immediately after Confederation. They illustrate that the judges were in accord with the views of the statesmen that the Lieutentant-Governors were the servants of the Government of Canada. However, these opinions were not unanimous and a few judges held a contrary view of the position of the Lieutenant-Governors in the Canadian constitutional framework, which was soon to receive the sanction of the Imperial Privy Council.

In *Attorney General of Quebec v. Attorney General of the Dominion* (35), a similar question of escheat arose as in *Mercer v. Attorney General of Canada* (36). Tessier, J., in the Quebec Court of Queen's Bench, took a realistic look at the position of the Lieutenant-Governor when he said:

> It is said that the Lieutenant-Governor does not represent Her Majesty in the same way as does the Governor General. This is true in a general sense, but not in regard to the special attributes given to the Lieutenant-Governor by the Imperial Act. In these he is as truly the representative of the Sovereign as is the Governor General in those which belong to him; otherwise Legislative Councillors would be persons of more importance and nearer royalty than the Lieutenant-Governor, because sect. 72 says they shall "be appointed by the Lieutenant-Governor, in the Queen's name", and those so appointed would find themselves above the power which in reality selects them. This would be a curious anomaly.

C. J. Ritchie in *Mercer v. Attorney General for Ontario* (37), in considering the rights of Canada and Ontario to escheat of certain lands in Ontario, said in his disenting judgment:

> To say then that the Lieutenant-Governors, because appointed by the Governor General, do not in any sense represent the Queen in the government of their provinces is, in my opinion, a fallacy; they represent the Queen as Lieutenant-Governors did before Confederation, in the performance of all executive or administrative acts now left to be performed by Lieutenant-Governors in the provinces in the name of the Queen; and this is notably made apparent in section 82, which enacts that "the Lieutenant-Governor of Ontario and Quebec shall from time to time, in the Queen's name, by instrument under the Great Seal of the province, summon and call together the Legislative Assembly of the province",—and with reference to which matter, nothing is said in respect to Nova Scotia or New Brunswick, the reason for which is obvious, the executive authority at confederation continuing to exist, the Lieutenant-Governors of those provinces were clothed with authority to represent the Queen, and in Her name call together the legislatures—and also in the section retaining the use of the Great Seals, for the Great Seal is never attached to a document except to authenticate an act done in the Queen's name, such as proclamations summoning the legislatures, commissions appointing the high executive officers of the province, grants of the public lands, which grants are always issued in the name of the Queen, under the provincial Great Seals.

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(34) *Queen* v. *Bank of Nova Scotia* (1885) 11 S.C.R. 1 at p. 24; *Gibson* v. *McDonald* (1885) 7 O.R. 401, at pp. 420-422; *Ex parte Dansereau* (1875) 19 L.C.J. 210 at 215; 2 Cart. at p. 124; *Attorney General of Quebec* v. *Attorney General of the Dominion, sub nom, Church* v. *Blake* (1876) 1 Q.L.R. 177; 3 Cart. at p. 100.

(35) *Sub nom, Church* v. *Blake* (1876) 2 Q.L.R. 236; 3 Cart. 100, at p. 105.

(36) (1881) 5 S.C.R. 538.

(37) (1881) 5 S.C.R. 538, at p. 637.

But the Chief Justice was careful not to give the same status to the Lieutenant-Governors as held by the colonial governors. He said (38):

> While I do not think it can be for a moment contended that the Lieutenant-Governors under confederation represent the Crown as the Lieutenant-Governors before Confederation did, I think it must be conceded that Lieutenant-Governors, since confederation, do represent the Crown, though in a modified manner.

Hagarty, C.J.O., deals realistically with the position of Lieutenant-Governors in *Regina v. The Catherines Milling and Lumber Co.* (39). The court was concerned with the right of the province of Ontario to certain lands over which Indians had been accustomed to roam but had not been set aside for reservations or granted by treaty. In discussing the executive power involved in dealing with these lands, he considered sections 12, 64 and 65 and said:

> If it had not been for the expression to be found in some judicial utterances placing within very narrow limits the powers of the executives of the provinces, I should have thought it too clear for argument, that the powers formerly exercised by the Lieutenant-Governors of the other Provinces, and by the Governor General of Canada in reference to provincial matters, including agreements or so-called treaties with the Indians for the extinguishment of their rights, and granting to them in lieu thereof certain reserves either for occupation or for sale, were now vested exclusively in the Lieutenant-Governors. The view that has been sometimes expressed that they do not represent Her Majesty for any purpose, appears to me to be founded on a fallacy, and to be taking altogether too narrow a view of an Act, which is not to be construed as an ordinary Act of Parliament, but as pointed out in *Queen* v. *Hodge*, is to be interpreted in a broad, liberal and quasi political sense.

Finally, there is much force to the argument of Papineau, J., in *Molson v. Chapleau* (40), where he said:

> Now if the Queen has withdrawn, by the federal compact, both from the legislature and executive of the provinces, and if the Lieutenant-Governors are not her representatives, and do not exercise in her name and in her stead the authority which they exercise, these provinces are no longer integral parts of the Empire. . . . Either the Lieutenant-Governors and legislators act in their own name (then they are independent of Her Majesty), or they do so in the name of Her Majesty, and then they are her representatives. If it is right to say that Her Majesty in person does not form part of the provincial legislatures and provincial governments, it is equally right to say that she forms part of them by representation. For she cannot cease to form part of them, personally or by representation, without ceasing to be Sovereign of those provinces. The representative of the Sovereign cannot be brought before the Courts any more than she herself can, except when and as she allows. It is not by inadvertence that the law directs the Lieutenant-Governors to choose the legislative councillors and to summon the Assemblies in the name of Her Majesty. This is in accordance with the very nature of the English constitution of which ours are only copies.

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(38) *Ibid*, at pp. 643-44.
(39) (1886) 13 O.A.R. 148, at p. 165.
(40) (1883) 6 Leg. News 222, at p. 224.

III

JUDICIAL VIEWS SINCE 1892 AS TO THE NATURE OF THE OFFICE

ANY doubt that the Lieutenant-Governors of the provinces are for the purposes of provincial government representatives of the Sovereign was finally settled by the judgment of the Judicial Committee in the *Liquidators of the Maritime Bank of Canada v. The Receiver General of New Brunswick* (41). The question there was whether the province could invoke the royal prerogative and claim payment in full over the other depositors and simple contract creditors of the bank. Against the contention of the province it was argued by the appellants that since there is no mention of the devolution of the prerogative in the *British North America Act*, the claim of the province must be founded on the general principle that the Lieutenant-Governor is entitled to exercise this prerogative of the Crown; but, it was argued, this could not be so because the direct connection between the Crown and the provinces had ceased. The appellants maintained that the effect of the *British North America Act* was to sever all connection between the Crown and the provinces, to make the government of Canada the only government of Her Majesty in North America, and to reduce the provinces to the rank of independent municipal institutions.

The respondents argued that the effect of sections 64 and 65 was to reserve to the provincial executives all the powers and authority which they had before the Act; read together, sections 64 and 65 mean that the powers of the provinces that were vested and exercised by them prior to Confederation should continue; provinces have co-ordinate authority within their spheres, and are in no way subordinate to the government of Canada.

In upholding the respondents' contention, Lord Watson, delivering the judgment of the Board, said (42)

> Their Lordships do not think it necessary to examine, in minute detail, the provisions of the Act of 1867, which nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the provinces. . . .
>
> It would require very express language, such as is not to be found in the Act of 1867, to warrant the inference that the Imperial Legislature meant to vest in the provinces of Canada the right of exercising supreme legislative powers in which the British Sovereign was to have no share. . . .

(41) (1892) A.C. 437. "Whatever obscurity may at one time have prevailed as to the position of a Lieutenant-Governor appointed on behalf of the Crown by the Governor-General has been dispelled by" this decision. *Bonanza Creek Gold Mining Co. Ltd.* v. R., (1916) 1 A.C. 566, at p. 580-81.

(42) (1892) A.C. 437, at pp. 441, 443.

If the Act had not committed to the Governor-General the power of appointing and removing Lieutenant-Governors, there would have been no room for the argument, which, if pushed to its logical conclusion, would prove that the Governor-General, and not the Queen, whose Viceroy he is, became the sovereign authority of the province whenever the Act of 1867 came into operation. But the argument ignores the fact that, by sect. 58, the appointment of a provincial governor is made by the "Governor General in Council by Instrument under the Great Seal of Canada", or, in other words, by the Executive Government of the Dominion, which is, by sect. 9, expressly declared "to continue and be vested in the Queen". There is no constitutional anomaly in an executive officer of the Crown receiving his appointment at the hands of a governing body who have no powers and no functions except as representatives of the Crown. The Act of the Governor-General and his council in making the appointment is, within the meaning of the statute the act of the Crown; and a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor General himself is for all purposes of Dominion government.

This decision has put to rest many questions concerning the status of the Lieutenant-Governor of a province. In the particular case the claim of the provincial government was for a Crown debt to which the prerogative attached. The decision established the proposition that the government of each province of Canada represents the Queen in the exercise of her prerogative as to all matters affecting the rights of the province. This decision affirmed a decision of the Supreme Court of Canada (43), which, in turn, had affirmed the decision of the Supreme Court of New Brunswick (44). Their Lordships said that "the provincial legislature does not occupy the subordinate position which was ascribed to it in the argument of the appellants. It derives no authority from the Government of Canada, and its status is in no way analogous to that of a municipal institution" (45).

More recently in *re The Initiative and Referendum Act* (46), it was held by the Judicial Committee of the Privy Council that section 92, head 1, of the *British North America Act, 1867,* which empowers a provincial legislature to amend the constitution of a province "except as regards the Office of Lieutenant-Governor", excludes the making of a law that abrogates any power that the Crown possesses through the Lieutenant-Governor who directly represents the Crown. Accordingly, the Board held to be invalid a provincial statute that compelled the Lieutenant-Governor to submit a proposed law to a body of voters totally distinct from the legislature of which he was the constitutional head and rendered him powerless to prevent it from becoming an actual law if approved by those voters since the effect of such a statute was wholly to exclude the Lieutenant-Governor from the new legislative authority.

The Board said (47):

Their Lordships are of opinion that the language of the Act cannot be construed otherwise than as intended seriously to affect the position of the Lieutenant-Governor as an integral part of the legislature, and to detract from rights which are important in the legal theory of that position. For

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(43) (1888) 20 S.C.R. 695, Gwynn, J., dissenting.
(44) (1888) 27 N.B. 379.
(45) (1892) A.C. 437, at p. 442.
(46) (1919) A.C. 935.
(47) *Ibid*, at p. 944.

if the Act is valid it compels him to submit a proposed law to a body of voters totally distinct from the legislature of which he is the constitutional head (48).

The same observation may be true with respect to adding to the rights and powers of the office. Thus Sir John Thompson, Minister of Justice upon the disallowance of *An Act respecting the Executive Power,* the first section of which declared that the "Lieutenant-Governor, or the person administering the government of the province is a corporation sole", said:

> The office of the Lieutenant-Governor is one of the incidents of the constitution, and the authority to legislate in respect thereof, is excepted from the powers conferred on the provinces, and is exclusively vested in the Parliament of Canada.
>
> In the opinion of the undersigned, it is immaterial whether a legislature by an Act seeks to add, or take from rights, powers and authorities which by virtue of his office, a Lieutenant-Governor exercises, in either case it is legislation respecting his office (49).

However, it may well be, as has been judicially stated, that section 92(1) of the *British North America Act* does not inhibit a statutory increase of powers and duties germane to the office of the Lieutenant-Governor, as for example, the power of commuting and remitting offences against the laws of the province or offences over which the legislative authority of a province extends (50).

In *Attorney General for Canada v. Attorney General of Ontario* (the Pardoning Power case), Chancellor Boyd, speaking of section 92(1) "which forbids interference with the office of Lieutenant-Governor", said:

> That veto is manifestly intended to keep intact the headship of the Provincial Government, forming, as it does, the link of federal power; no essential change is possible in the constitutional position or functions of this chief officer, but that does not inhibit a statutory increase of duties germane to the office (51).

This view appears consistent with the later decision of the Judicial Committee of the Privy Council in *Attorney General for the Dominion of Canada v. Attorney General for Ontario* (52), wherein it was held that a statute of Ontario, which empowered the Lieutenant-Governor of the

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(48) In Ontario the constitutionality of *An Act to extend the Duration of the present Legislative Assembly* was questioned before Hope J., of the Ontario High Court of Justice (1943) O.R. 319, at p. 324. Counsel contended that section 92(1) of the *British North America Act* did not empower the legislature to extend the duration of the legislative assembly since by its so doing the Crown would be deprived of its prerogative to summon a new assembly at the expiry of the normal term. The learned judge did not accept this contention. He said:

> "The *Act of Extension* is not an Act solely of the Legislative Assembly, consisting of elected members representing the people . . ., but of the legislature, which therefore includes the concurrence of the Lieutenant-Governor. An Act only becomes operative as law on receiving the royal assent. Hence a surrender, if any, of the particular prerogative of the Crown, as exercised by the Lieutenant-Governor, resulting from the *Act of Extension* in question has been with the concurrence of the Crown by reason of the royal assent thereto."

After referring to the decision *In re The Initiative and Referendum Act,* the learned judge was of opinion that this situation was entirely different and that the Act in question did not attempt to exclude the Lieutenant-Governor from the scheme of government.

(49) *Dominion-Provincial Legislation,* at p. 338. See also *ibid,* p. 851.

(50) *Attorney General for Canada* v. *Attorney General of Ontario* (1891) 20 O.R. 222; (1893) 19 O.A.R. 31; (1894) 23 S.C.R. 458.

(51) (1891) 20 O.R. 222, at p. 247.

(52) (1898) A.C. 247.

province to confer precedence by patents upon such members of the bar of the province as he might think fit to select, was *intra vires* of the provincial legislature by virtue of sections 92(1), (4) and (14) of the *British North America Act, 1867.*

Perhaps the true effect of the words of exception in section 92(1) of the *British North America Act* was stated by Mr. Edward Blake, Q.C., in his argument before the Ontario Court of Appeal in the *Pardoning Power Case* (53). Mr. Blake said:

> This means that those elements of the constitution which can be properly deemed to be parts of the constitution relating to the office of Lieutenant-Governors are not to be changed; and for an obvious reason, because the Lieutenant-Governor is the link between the federal and provincial, aye, and between the imperial and provincial authority; he is the means of communication; he is the agent and conduit of imperial as well as federal connection; and. therefore, his office under the constitution, his constitutional position as a federal officer, is not to be affected.

The Ontario Court of Appeal (54) and the majority of the Supreme Court of Canada (55) affirmed him in holding the Ontario Act there in question *intra vires,* though it purported to vest certain powers, authorities and functions in the Lieutenant-Governor of Ontario.

Another question arising out of section 92, head 1, involves delegation of legislative powers to the Lieutenant-Governor of a province. In *Hodge v. The Queen* (56), the Judicial Committee of the Privy Council declared that section 92

> conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect. . . .
>
> It is obvious that such an authority is ancillary to legislation. . . .

The Privy Council also said in *The Initiative and Referendum Case* (57):

> Sect. 92 of the Act of 1867 entrusts the legislative power in a province to its Legislature, and to that Legislature only. No doubt a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as has been done in *Hodge v. The Queen,* the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence.

From these cases it could be argued that the delegation to the Lieutenant-Governor of other than authority to make "ancillary legislation" is to create a "new legislative power" and thus is an interference with the office of the Lieutenant-Governor. The Appellate Division of the Alberta

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(53) (1893) 19 O.A.R. 31.
(54) *Ibid.*
(55) (1894) 23 S.C.R. 458.
(56) (1883) 9 App. Cas. 117, at p. 132.
(57) (1919) A.C. 938, at p. 945.

Supreme Court adopted this view in *Credit Foncier Franco-Canadian v. Ross et al and Attorney General for Alberta* (58). Referring to section 12 of the *Reduction and Settlement of Debts Act*, which purported to give the Lieutenant-Governor the power to declare any kind of description of debt to which the Act did not apply, the learned judge said in delivering the judgement of the Court:

> No doubt the Lieutenant-Governor is an integral part of the Legislature but his function is not to initiate or to enact legislation but merely to authorize the introduction to the Legislative Assembly of certain classes of legislation and to assent to or withhold assent from legislation proposed by the Legislative Assembly. What is intended by section 12 is to confer a quite different function from any of those recognized by the Constitution. This question was considered *In re Initiative and Referendum Act*. . . . This case is different only in that it adds to rather than substracts from the Lieutenant-Governor's functions. That difference in my opinion is of no importance. . . .
>
> It is apparent that the authority to make regulations in order to make legislation enacted by the Legislature completely effective is quite a different thing from authority to make an independent enactment. That is not ancillary legislation but is legislation itself.

This judgment was criticized in the British Columbia Court of Appeal (59). Although the argument still remains it appears to be of little force because of the judgment of the Judicial Committee of the Privy Council in *Shannon v. Lower Mainland Dairy Products Board* (60), in which it was said:

> The third question is that it is not within the powers of the Provincial Legislature to delegate so-called legislative powers to the Lieutenant-Governor in Council or to give him powers of further delegation. This objection appears to their Lordships subversive of the rights which the Provincial Legislature enjoys while dealing with matters falling within the classes of subjects in relation to which the constitution has granted legislative powers. Within its appointed sphere the Provincial Legislature is as supreme as any other Parliament; and it is unnecessary to enumerate the innumerable occasions on which Legislatures, Provincial, Dominion and Imperial, have entrusted various persons and bodies with similar powers to those contained in this Act.

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(58) (1937) 2 W.W.R. 353, at pp. 357-58.
(59) *In Re Natural Products Marketing (British Columbia) Act* (1937) 3 W.W.R. 273.
(60) (1938) A.C. 708, at p. 722.

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IV

THE DUAL CAPACITY OF LIEUTENANT-GOVERNORS IN RELATION TO FUNCTIONS

It is submitted that the Lieutenant-Governor as the head of the Executive Government of the Province (section 58, *British North America Act*) and as a constituent branch of each provincial legislature (sections 69, 71 and 88, *British North America Act*) acts in two capacities:

(*a*) as the representative of the Sovereign for all purposes of provincial government, and

(*b*) as a federal officer in respect of the discharge of certain of his functions.

(*a*) *As representative of the Sovereign*

In this respect it has been said that "so far as regards the internal administration of his government, he is merely a constitutional sovereign, acting through his advisers, interfering with their policy or their patronage, if at all, only as a friend and important councillor.... Under responsible government he becomes the image, in little, of a constitutional King. He has to reconcile as well as he can his double function as Governor responsible to the Crown (in Canada to the Governor General in Council) and as a constitutional head of an executive controlled by his advisers" (61).

It was laid down by the Judicial Committee of the Privy Council in the *Liquidators of the Maritime Bank of Canada v. The Receiver General of Canada* (62) that, as the appointment of a provincial Governor is made by the Governor General in Council by instrument under the Great Seal of Canada, and, therefore really by the Executive Government of Canada, which is in the Sovereign, "the act of the Governor General and His Council in making the appointment is, within the meaning of the statute" —(i.e., the *British North America Act*)—"the act of the Crown; and a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor General himself is for all purposes of Dominion Government". It is submitted that this pronouncement still leaves open the question whether or not the Lieutenant-Governor of a province is the direct representative of the Sovereign.

Lord Haldane, in *In re Initiative and Referendum Act* (63) says that subject to the Act, the "province was to retain its independence and

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(61) Mr. Herman Merivale, for 12 years Under Secretary of State for the Colonies, in Col. and C., pp. 649, 666, quoted with approval in *British Rule and Jurisdiction beyond the Seas*, by Sir Henry Jenkyns, Parliament Counsel to the United Kingdom, 1902, at pp. 105-6.

(62) (1892) A.C. 437, at p. 443.

(63) (1919) A.C. 935, at p. 942-43.

autonomy and to be directly under the Crown as its Head". Similarly, he specifically mentions the Lieutenant-Governors as directly representing the Sovereign:

> The references their Lordships have already made to the character of the office of the Lieutenant-Governor, and to his position as directly representing the Sovereign in the province, renders natural the exclusion of his office from the power conferred on the Provincial Legislature to amend the constitution of the Province. The analogy of the British Constitution is that on which the entire scheme is founded, and that analogy points to the impropriety, in the absence of clear and unmistakeable language, of construing section 92 as permitting the abrogation of any power which the Crown possesses through a person who directly represents it.

While in this passage Lord Haldane twice speaks of the Lieutenant-Governor as "directly" representing the Sovereign in the province, this observation appears to be in the nature of *obiter dictum* rather than an essential feature of the *ratio decidendi*. The only reasonable interpretation that can be placed on it is that the Lieutenant-Governor directly represents the Governor General in Council who acts in the name of and on behalf of the Sovereign. For, while the *British North America Act, 1867*, by section 9, declares that the Executive Government and authority of and over Canada shall continue and be vested in the Queen, section 10 speaks of the Governor General, for the time being of Canada, "carrying on the Government of Canada on behalf and in the name of the Queen", but, in virtue of section 11, aided and advised in the Government of Canada, by the Queen's Privy Council for Canada. Hence, if the act of the Governor General in Council, in appointing a Lieutenant-Governor, is, in effect, the act of the Sovereign, it is none the less the act of the Sovereign in respect of the Government of Canada; that is to say, of His Excellency the Governor General in Council by whom the Executive Government of Canada, which is in the Sovereign, is carried on. The confirmation of this view is the pronouncement of Duff, C. J., (delivering judgment on behalf of himself and Davis, J.) in the *Reference re the Powers of Disallowance and Reservation* (64). In that case after referring to the two judgments above cited, he said:

> In substance, these judgments declare that, in the appointment of a Provincial Governor, the Governor General in Council under section 58 is acting as the Executive Government of the Dominion which, by section 9 of the statute, is declared to be vested in the Queen.

It is, moreover, not without significance that the Lieutenant-Governor of a province is, by statute, a *Lieutenant*-Governor, and, therefore, as that title implies, nominally subordinate to the Governor General. The Governor General alone may, it is submitted, properly be considered the direct representative of Her Majesty in Canada. No other view of the constitutional status of the Office of the Lieutenant-Governor of a province would appear to be consistent with the relevant sections of the *British North America Act*, the views of statesmen and judicial dicta. The latter, which recognize that Lieutenant-Governors do represent the Sovereign for purposes of provincial government but treat the Governor General as being the Sovereign's only *direct* representative, appear still to have some effect (65). Of particular interest and correctness as indicating the relationship of the Lieutenant-Governor to the Canadian Government

(64) (1938) S.C.R. 71 at p. 76.
(65) See II, *supra*.

is the statement of Boyd, C., in *Attorney General of Canada v. Attorney General of Ontario* (66). Referring to the prohibition against interference with the office of the Lieutenant-Governor, he said:

> that veto is manifestly intended to keep intact the headship of the Provincial Government forming, as it does, the link of federal power; no essential change is possible in the constitutional position or functions of the chief officer.

In result, it would appear that although the Lieutenant-Governor of a province, as such, is a representative of the Queen and is entitled to describe himself as such, the Governor General is the only direct representative of Her Majesty and the only person who is, as of right, entitled to the privileges and courtesies that are incident to that high office.

(*b*) *As a Federal Officer*

Although a Lieutenant-Governor is a representative of the Sovereign for purposes of provincial government, it is evident that in respect of certain of his functions, he is a federal officer. If the act of the Governor General in Council in appointing a Lieutenant-Governor is, in effect, the act of the Sovereign (67), it is none the less the act of the Sovereign in respect of his Government of Canada. Moreover, the salaries of the Lieutenant-Governors are fixed and provided for by Parliament (68); and still more significant as indicating the capacity of the Lieutenant-Governor as a federal officer is the fact that he is required, whenever a bill passed by the provincial legislature is presented to him for the royal assent to declare, according to his discretion, but subject to the provisions of the *British North America Act* and to the Governor General's instructions, either that he assents thereto in the Governor General's name or that he withholds the Governor General's assent or that he reserves the bill for the signification of the Governor General's pleasure. In respect of these functions, a Lieutenant-Governor appears to act strictly as a federal officer, subject to the instructions of the Governor General in Council; but his capacity as a federal officer in relation to assenting to or withholding assent to a bill passed by the provincial legislature, and presented to him for assent, is, in actual practice, only nominal. It is recognized, and has indeed been affirmed, by the Governor General in Council (69), that in these matters the authority of the Crown should be exercised and administered in conformity with the settled constitutional principles of responsible government.

An additional function that appertains to the office of the Lieutenant-Governor, in his capacity as a federal officer, is that of publishing a proclamation signifying the disallowance by the Governor General in Council of a provincial statute (see letters from Sir John Macdonald to Lieutenant-Governor Angers of September 18 and 22, 1888 (70); in the letter of September 22, Sir John Macdonald stated that having consulted with the Minister of Justice and with Sir Hector Langevin, they had concluded "that it is the duty of a Lieutenant-Governor, as a federal officer, to cause a proclamation of the disallowance to be published").

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(66) (1891) 20 O.R. 222, at p. 247.

(67) *Liquidators of the Maritime Bank of Canada* v. *Receiver General of New Brunswick* (1892) A.C. 43 at p. 443; *In re The Initiative and Referendum Act* (1919) A.C. 935.

(68) Section 60, *B.N.A. Act* and the *Salaries Act*, R.S.C. 1927, c. 182.

(69) See pp. 25-6 *infra*.

(70) *Correspondence of Sir John Macdonald, 1840-1891*, by Sir Joseph Pope, at pp. 423-25.

That a Lieutenant-Governor was viewed by the Imperial authorities as a federal officer seems to be clear from the proceedings connected with the dismissal in 1879 of His Honour Luc Letellier, Lieutenant-Governor of the Province of Quebec. In 1878 Mr. Letellier dismissed his ministers for reasons already given (71). He claimed in defending his conduct that his action in so dismissing his ministers and in calling upon others to take office in their stead was purely a provincial matter affecting in no way federal interests and was not one of the causes contemplated in section 59 justifying the removal of a Lieutenant-Governor. In view of the importance of the precedent, the matter was referred to the Imperial government for their consideration and instructions. Sir M. Hicks-Beach, Secretary of State for the Colonies, in a despatch dated July 3, 1879, conveyed to the Governor General of Canada the conclusions of Her Majesty's government. In expressing the opinion of the Imperial government on the abstract question of the functions and responsibilities of the Governor General in relation to the Lieutenant-Governor of a province under the *British North America Act,* the despatch stated that:

> There can be no doubt that a Lieutenant-Governor of a Province has an unquestionable right to dismiss his Ministers if from any cause he feels it incumbent upon him to do so. In the exercise of this right, as of any other of his functions, he should, of course, maintain the impartiality towards rival political parties which is essential to the proper performance of the duties of his office, and, for any action he may take, he is (under the 59th section of the *British North America Act*), directly responsible to the Governor General. In deciding whether the conduct of a Lieutenant-Governor merits removal from office, the Governor General—as in the exercise of other powers vested in him by the Imperial statute—must act "by and with the advice of his Ministers" . . . Though the position of a Lieutenant-Governor would entitle his opinion on the subject to peculiar weight, yet Her Majesty's Government do not find anything in the circumstances which would justify him in departing, in this instance, from the general rule and declining to follow the decided and sustained opinion of his Ministers who are responsible for the peace, order and good government of the Dominion to the Parliament, to which (according to the 59th section of the statute) the cause assigned for the removal of a Lieutenant-Governor must be communicated (72).

However, the position of the Lieutenant-Governor has become more complex by virtue of a recent decision in the Supreme Court of Canada (73). The question for decision was whether a retired judge was entitled to the continuation of his pension, after he was appointed Lieutenant-Governor, under section 27(1) of the *Judges Act* (74), which then read as follows:

> If any person become entitled to a pension after the first day of July, one thousand nine hundred and twenty, under this Act, and become entitled

(71) *Supra* at p. 3.

(72) See also the numerous judicial references with respect to the capacity of a Lieutenant-Governor as a federal officer in IV *supra.* In addition see Order in Council of June 25, 1879, approving the report of the Minister of Justice; *Dominion-Provincial Legislation,* 1867-1895 at p. 1204; Order in Council of November 29, 1882, *ibid* at pp. 77-8; Letters from Sir John Macdonald to the Hon. J. C. Aikins, July 28, 1884; to Lieutenant-Governor Angers, September 18, September 22, 1888, in the *Correspondence of Sir John Macdonald,* 1840-1891, by Sir Joseph Pope, at pp. 315, 423, 425. Todd's *Parliamentary Government in the British Colonies,* at p. 517. The Hon. Edward Blake's argument in the *Pardoning Power Case* in the Ontario Court of Appeal; quoted in LeFroy's *Canada's Federal System,* at pp. 26-7. Also, in this respect, refer to the forms of the Commission and instructions issued by the Governor General in Council under the Great Seal of Canada and the Sign Manual of the Governor General, respectively, in Appendices B and C.

(73) *The King* v. *Carroll* (1948) S.C.R. 126.

(74) R.S.C. 1927, c. 105 (Am. 1946, c. 56, s. 27).

to any salary in respect of any public office under His Majesty in respect of his Government of Canada, such salary shall be reduced by the amount of such pension.

To answer the question the Court had to determine whether or not the office of the Lieutenant-Governor is "a public office under His Majesty in respect of his Government of Canada."

Taschereau, J., did not accept the argument for the affirmative of the Attorney General for Canada that the relevant provisions of the *British North America Act* bring him within the phrase. He referred to section 10, which describes the Governor General as an officer "carrying on the Government of Canada" and to section 62, which refers to the Lieutenant-Governor as an officer "carrying on the Government of a Province". Then, after considering the decisions of the Judicial Committee of the Privy Council in the *Liquidators of the Maritime Bank v. Receiver General of New Brunswick* and *In re Initiative and Referendum Act*, he concludes (75)

> as a consequence of these judicial pronouncements, the nature of the federal and provincial legislative and executive powers is clearly settled, and a Lieutenant-Governor, who "carries on the Government of the Province", manifestly does not act in respect of the Government of Canada. All the functions he performs are directed to the affairs of the Province and are in no way connected with the Government of Canada, and it is the functions that he performs that must be examined in order to determine the nature of his office.

Then he refers specifically to the provisions which indicate him to be a federal officer and says (76):

> The framers of our Constitution have reserved to the Governor General in Council the necessary authority to interfere, in a certain way, in provincial matters, but the exercise of these powers, contemplated to be for the better government of the provinces, does not modify the legal status of the provincial executives, and does not purport to make them act. on behalf of the Federal authority. Their functions remain unaltered. These interferences may, of course, limit the powers of a Lieutenant-Governor and even in certain cases prevent him from exercising them, but his jurisdiction nevertheless remains entirely within the provincial field. His authority is obviously curtailed when these constitutional powers are exercised by the Governor General in Council, but I do not think that it can be said, that it changes in character.

Kellock and Locke, J. J., referred to the relevant sections of the *British North America Act*, the decisions of the Judicial Committee of the Privy Council in the *Liquidators of the Maritime Bank v. the Receiver General of Canada* and *In re Initiative and Referendum Act* and held (77):

> It is not possible to describe the office of the Lieutenant-Governor as an officer under the Governor General in Council.

This decision must be considered in the light of the facts involved. In view of the integrated system of Government in Canada, it may be that the decision cannot be interpreted as laying down the wide proposition that the Lieutenant-Governor is not under the Governor General for any purpose, for it can hardly be said that the two are, for all purposes, completely independent officials under one Crown.

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(75) (1948) S.C.R. 126 at p. 130-131.
(76) *Ibid*, at p. 131.
(77) *Ibid*, at p. 135.

V

PRINCIPLES GOVERNING ASSENT OR WITHHOLDING ASSENT TO BILLS OR RESERVING BILLS

Assenting, or Withholding Assent, to Bills.

Since Confederation, Lieutenant-Governors of the various provinces have withheld their consent from twenty-six bills of provincial legislatures. There have been five in Nova Scotia, nine in New Brunswick, eight in Ontario, one in Quebec and three in Prince Edward Island.

By constitutional analogy, it may be assumed that Lieutenant-Governors are not at liberty to withhold the royal assent to bills that have passed the legislative chambers inasmuch as the power of veto by the Crown is now practically obsolete in England. Once a bill has passed the legislative body by ministerial consent or acquiescence, it must ordinarily receive the royal sanction. The act of a Lieutenant-Governor in withholding the assent of the Crown to a bill that has been passed by the legislative chambers—wherein a responsible minister should be able to exercise a constitutional influence in the control of legislation—would be a difficult and delicate proceeding. It is one that must obviously be advised by some minister who is in a position to become responsible for the same. If a Lieutenant-Governor should for any reason deem it imperative upon him to take such a course, and his ministers should not concur therein, he must be prepared to accept their resignation, and be able to form a new ministry by whom the Act proposed could be constitutionally advised and justified to the legislative chambers (78).

These principles are in accordance with those that have, from time to time, been affirmed by the Government of Canada. In a report approved by Order in Council of 29th August, 1873, Sir John Macdonald, in expressing the opinion that certain provincial Acts were within the competence of the provincial legislature and ought to have been assented to by the Lieutenant-Governor, said:

> Under the system of Government that obtains in England as well as in the Dominion and its several Provinces, it is the duty of the advisers of the executive to recommend every measure that has passed the legislature for the executive assent. . . . The Ministers of the Governor General and of the Lieutenant-Governor are alike bound to oppose in the legislature, measures of which they disapprove, and if, notwithstanding, such a measure is carried, the ministry should either resign or accept the decision of the legislature, and advise the passage of the bill. It then rests with the Governor General or the Lieutenant-Governor, as the case may be, to consider whether the Act conflicts with his instructions or his duty as an Imperial or Dominion officer—and if it does so conflict, he is bound to reserve it, whatever the advice tendered to him may be; but if not he will doubtless feel it his duty to give his assent, in accordance with advice to that effect, which it was the duty of his Ministers to give (79).

(78) Todd, *"Parliamentary Government in the British Colonies"*, at p. 518.
(79) *Dominion and Provincial Legislation*, at pp. 104-105.

In a report approved by Order of the Governor General in Council the 25th October, 1876, the Honourable Edward Blake said:

> It appears to the undersigned that, as a general rule, the Lieutenant-Governor should himself act with the advice of Ministers upon the question of assent. To this rule there will no doubt be, from time to time, exceptions (80).

Further, in an Order of the Governor General in Council, dated November 29, 1882, copies of which were communicated to the Lieutenant-Governors of the various provinces, it was stated:

> Now in England the ministry of the day must of necessity have the confidence of the majority in the popular branch of the legislature, and, therefore, they generally control or rather direct current legislation. Should, however, any Bill be passed, notwithstanding their opposition or adverse opinion, they cannot advise its rejection by the Sovereign. The power of veto by the Crown is now admitted to be obsolete and practically non-existent. The expression "Le Roi ou la Reine s'avisera", has not been heard in the British Parliament since 1707 in the Reign of Queen Anne, and will in all probability never be heard again. The Ministers in such a case, if they decline to accept the responsibility of submitting the bill for the royal assent, must resign and leave to others the duty of doing so. If, notwithstanding their adverse opinion they do not think the measure such as to call for their resignation they must submit to the will of Parliament and advise the Sovereign to give the royal assent to it (81).

This reasoning proceeds clearly upon the theory that the Lieutenant-Governors should occupy towards their executive council and towards their local legislatures, the identical relation occupied by the Governor General in Council and by the Queen in the United Kingdom towards their several Privy Councils and Parliaments.

The Lieutenant-Governors have obviously not followed this reasoning. The last two times that assent has been withheld in Canada occurred in Prince Edward Island. In 1924 the Lieuenant-Governor of the province withheld his assent to a bill respecting the union of certain churches under the name of the United Church of Canada (82). The measure had received a majority of the votes in the assembly but, inasmuch as it required non-concurring members for the time being to become members of a body of which they did not approve, the Lieutenant-Governor objected to the bill on the ground that it was an infringement on the right of freedom of worship. The last case in which assent has been withheld occurred in the same province in 1945 when the Lieutenant-Governor refused his assent to a bill to amend the local *Prohibition Act.* Like the bill of 1924, it had passed the assembly and assent was not withheld on instructions of the Governor General. He was advised in no way by his ministers. The reason for the refusal of assent is not clear but it was withheld on His Honour's own initiative. In both these cases the policy of the Canadian Government, as expressed in the Order in Council of November 29, 1882, (83) was upheld.

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(80) *Ibid,* at p. 816.

(81) *Ibid,* at p. 78.

(82) The Lieutenant-Governor withheld his assent with the words "I withhold my assent to this Bill". However, the form of withholding assent, either in the name of the Governor General, or the name of the Sovereign, or neither, would appear not to affect the legal validity of the Act. See *Reference re Powers of Disallowance and Reservation* (1938) S.C.R. 71, and note *supra* at p. 8.

(83) See *infra,* at p. 25.

An incidental question arose out of the last instance of a refusal to assent to a bill, namely, that once the assent was withheld, could the bill be resuscitated by the subsequent assent of a succeeding Lieutenant-Governor? The question was answered in the negative by Campbell, C. J., of the Prince Edward Island Supreme Court (84). Referring to sections 56, 57 and 90, he said:

> The total result is that a Lieutenant-Governor may assent to a Bill in the Sovereign's name, or he may withhold the Sovereign's assent, or he may reserve the Bill for the signification of the Governor General's pleasure. A Bill which has received the Royal Assent may later be disallowed; or a Bill which has been reserved may later receive assent; but there is no provision for reconsideration of a "withheld" assent . . . (the succeeding Lieutenant-Governor) would appear to be *functus officio*, at least until the Bill is re-presented to him by the House (85).

Reservation of bills.

The power of reserving bills is given to Lieutenant-Governors by the blending of sections 55 and 90 of the *British North America Act* and a Lieutenant-Governor may, in his discretion, and subject to the provisions of the Act and the instructions of the Governor General, reserve a bill for the pleasure of the Governor General. Paragraph IV of his instructions (86) provides that when a bill is reserved it should be fairly abstracted in the margin and, when it appears necessary to the Lieutenant-Governor, accompanied by a statement why the law was proposed. Since Confederation sixty-nine bills have been reserved for the signification of the Governor General by the provincial Lieutenant-Governors (87). It thus appears that the Lieutenant-Governors, as federal officers, have repeatedly assumed the responsibility of reserving, for the consideration of the Governor General, bills that appeared to them to contain doubtful or objectionable features.

The principles of law, constitutional usage and attitude of the government of Canada concerning the exercise of this power has been discussed in *Disallowance and Reservation of Provincial Legislation.* It may be briefly mentioned that the Canadian government has held it at variance with the principles of constitutional government for a Lieutenant-Governor to reserve for the pleasure of the Governor General a bill that is "entirely within the legislative authority of the Provincial Legislature, and in which no Dominion or Imperial interests are involved". The policy of the federal government is clearly expressed in detail in an Order in Council of November 29, 1882, copies of which were transmitted to the Lieutenant-Governors of the various provinces.

> The Committee in Council deem it their duty to call the attention of Your Excellency to the fact that in several provinces, bills passed by the legislature have been reserved for the Governor General's assent by their Lieutenant-Governors on the advice of their Ministers.

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(84) *Gallant* v. *R.* (1949) 2 D.L.R. 425, at p. 430.

(85) It is to be noted that there is no suggestion that the power is legally obsolete. See also *Rex ex rel. Tolfree* v. *Clark* (1943) O.R. 319, where Mr. Justice Hope seems to indicate a valid use for the power. In upholding the constitutionality of *An Act to Extend the Duration of the Present Legislative Assembly*, the learned judge said, at p. 328: "It should not be overlooked that . . . there always exists as a safeguard against unwarranted prolongation, the right of the Lieutenant-Governor, in his exercise of the royal prerogative, to refuse assent to an enactment".

(86) See Appendix C.

(87) See Appendix B, G. V. La Forest, *Disallowance and Reservation of Provincial Legislation*, Department of Justice, Ottawa.

This practice is at variance with those principles of constitutional government which obtain in England, and should be carried out in Canada and its provinces.

As the relations between the Governor General and his responsible advisers, as well as his position as an Imperial officer, are similar to the relations of a Lieutenant-Governor with his ministers and his position as a Dominion officer, it is only necessary to define the duties and responsibilities of the former in order to ascertain those of a Lieutenant-Governor. Now it is clear that since the concession of responsible government to the colonies, *the advisers of the Governor General hold the same position with regard to him*, as the imperial ministry does with respect to Her Majesty. They have the same powers and duties and responsibilities. They ought not to have, and of right have not, any greater authority with respect to the legislation of the Canadian Parliament, than the Queen's Ministers have over the legislative action of the Imperial Legislature.

Now in England the ministry of the day must of necessity have the confidence of the majority in the popular branch of the legislature, and therefore they generally control, or rather direct, current legislation.

Should, however, any bill be passed notwithstanding their opposition or adverse opinion, they cannot advise its rejection by the sovereign.

The power of veto by the Crown is now admitted to be obsolete and practically non-existent. The expression "Le Roi ou la Reine s'avisera", has not been heard in the British Parliament since 1707, in the reign of Queen Anne, and will in all probability never be heard again. The ministers in such a case, if they decline to accept the responsibility of submitting the bill for the royal assent, must resign and leave to others the duty of doing so.

If, notwithstanding their adverse opinion, they do not think the measure such as to call for their resignation, they must submit to the will of Parliament and advise their sovereign to give royal assent to it.

Under the same circumstances Your Excellency's advisers must pursue the same course.

The right of reserving bills for the royal assent, conferred by the *British North America Act* was not given for the purpose of increasing the power of the Canadian ministers, or enabling them to evade the constitutional duty above referred to.

The power was given to the Governor General as an imperial officer and for the protection of imperial interests. It arises from our position as a dependency of the empire, and to prevent legislation which in the opinion of the Imperial Government is opposed to the welfare of the empire or its policy.

For the exercise of this power the Governor General with or without instructions from Her Majesty's Government, is responsible only to the British Government and Parliament, and should the Canadian Government or Parliament deem at any time that the power has been exercised oppressively, improperly, or without due regard to the interests of the Dominion, their only course is to appeal to the Crown and eventually to the British Parliament for redress.

As has already been stated, the same principles and reasons apply, *mutatis mutandis*, to the provincial governments and legislatures.

The Lieutenant-Governor is not warranted in reserving any measure for the assent of the Governor General on the advice of his ministers. He should do so in his capacity of a Dominion officer only, and on instructions from the Governor General. It is only in case of extreme necessity that a Lieutenant-Governor should without such instructions exercise his discretion as a Dominion officer in reserving a bill. In fact, with facility of communication between the Dominion and Provincial governments such a necessity can seldom if ever arise.

If this minute be concurred in by Your Excellency, the committee recommend that it be transmitted to the Lieutenant-Governors of the several provinces of the Dominion for their instruction and guidance (88).

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(88) *Dominion and Provincial Legislation*, at p. 77.

Of the sixty-nine bills that have been reserved for the pleasure of the Governor General, thirteen have been assented to by him, and with respect to the balance, either no assent was given or no action taken (89). The vast majority of these were reserved before the turn of the century but the power is by no means obsolete. Any doubt that this power is still subsisting has been put to rest by the decision of the Supreme Court of Canada in *Reference re Powers of Disallowance and Reservation* (90), where Duff, C.J., (p. 79) said:

> As to reservation, the statute in express terms (section 55, as re-enacted by section 90) imposes on the Lieutenant-Governor the duty to declare either that he assents to a bill presented to him, or that he withholds assent, or that he reserves the bill for the signification of the Governor General's pleasure. He is to act, the statute says, "according to his discretion, but subject to the provisions of this Act and to . . . Instructions" of the Governor General.
>
> There is nothing in the *British North America Act* controlling this discretion; nor is there any other statute having any relevancy to the matter.
>
> The power of reservation is subject to no limitation or restriction, except in so far as his discretion in exercising it may be controlled or regulated by the Instructions of the Governor General and it is not suggested that the Instructions contain anything of that character.

In conclusion, however, it should be noted that the principles stated here concerning the circumstances under which the Lieutenant-Governor would be justified in withholding the royal assent to a bill, or reserving a bill for the signification of the Governor General's pleasure, have not gained general acceptance. For instance, Professor Keith says in his *Responsible Government in the Dominions* (91):

> The modern usage is certainly the completion of legislation and then disallowance, but there is no reason to suppose that either reservation or refusal of assent is obsolete, still less is there ground to accept either the dictum of Sir J. Macdonald that a Lieutenant-Governor should never refuse assent on minister's advice or Mr. Todd's conclusion that he should only refuse assent, if at all, on that advice. If the Ministers find that an enactment is mistaken, they can quite properly take the responsibility of telling the Lieutenant-Governor so, and facing Parliament on the issue; on the other hand, if the Legislature is about to pass an unwise Bill offending Imperial or Dominion interests vitally, the Dominion Government would be lacking in a sense of duty if it did not forbid assent, if the matter were such that enactment might result in irreparable injury, for it must be remembered that an Act ceases to be valid from the date of disallowance (*Wilson v. Esquimalt & Nanaimo R. Co.* (1922) 1 A.C. 202) but the validity of matters already done under it is not thereby affected.

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(89) See G. V. La Forest, *Disallowance and Reservation of Provincial Legislation*, Appendix B.

(90) (1938) S.C.R. 71, at p. 79.

(91) Vol. 1, at p. 564.

VI

THE EXTENT OF THE POWERS OF THE LIEUTENANT-GOVERNOR

THE Lieutenant-Governor of a province being the representative of the Sovereign for all purposes of provincial government, the question remains, how far and in what manner he is or may be vested with the power or duty of exercising the royal prerogative? The question has not been before the courts too often, possibly because provincial legislatures, under their grant of legislative power, are enabled to enact Acts of an executive nature to carry out the purposes of local government, but, as LeFroy points out:

> The point ... is not without importance, for any such Act is subject to disallowance by the Governor General in Council, and it is a very different thing that provincial legislatures should have control over royal prerogatives immediately relating to the subjects over which they have legislative jurisdiction from the Lieutenant-Governors having such prerogatives vested in them *virtute officii* (92).

Further, the courts may revivify a prerogative power. For example, in *Bonanza Creek Gold Mining Co. Ltd.* v. *The King* (93), the Judicial Committee of the Privy Council held that the Lieutenant-Governors could create corporations by letters patent under their prerogative powers, which still continued after the Union by virtue of sections 64 and 65 of the *British North America Act.*

Prerogative power has been defined by O'Connor in his *Report to the Senate on the British North America Act,* 1939, at p. 146, in the following terms:

> When we speak in our day of a Prerogative of the Crown we mean a right that remains in the Sovereign as one of that bundle of discretionary common law rights which were, at and by the common law, exercisable by the Sovereign in person, and we use that term whether the prerogative in question is or is not now exercisable by the Sovereign in person, or through him by his representative, and though that prerogative may now be exercisable in his name by his constitutional advisers, and so only; and when we speak of an executive power we mean a right exercisable in the name of the Crown by the Sovereign's constitutional advisers, whether the right be one of prerogative origin or be one that arises from, or is aided by, statute, . . .

It is apparent from the following illustrations that the Imperial authorities and statesmen of the period immediately after the Union considered that the Lieutenant-Governors had no power to exercise the prerogative powers except those conferred by statute or found in their commissions or instructions.

The 44th resolution adopted at the Quebec Conference conferred upon the Lieutenant-Governors the prerogative power of pardoning criminal offenders. Her Majesty's Government objected to this power being so vested as "it appears to Her Majesty's Government that this duty belongs to the Representative of the Sovereign, and could not with propriety be devolved upon the Lieutenant-Governors, who will, under the present

(92) LeFroy, *Legislative Power in Canada* (1897-98), note, at p. 115.
(93) (1916) 1 A.C. 566.

scheme, be appointed, not directly by the Crown, but by the Central Government of the United Provinces". The clause was omitted for the "avowed purpose of confining the exercise of the pardoning power to Her Majesty's Representative holding Her Majesty's direct authority for its exercise, and if it is now held that such power is vested in the Lieutenant-Governors appointed since the Union, the intention of Her Majesty's Government will have been thwarted" (94). Similarly, Earl Granville, Secretary of State for the Colonies said in a despatch to Sir J. Young, then Governor General:

> Now the Lieutenant-Governors of the Provinces under the new system are to be appointed not directly by the Queen, but by the Governor-General in Council, and the new Lieutenant-Governors would not take the power of pardoning *virtute officii* unless it be so given them by the Act (95).

In 1872, with respect to the Lieutenant-Governors' exercise of the prerogative in the appointment of Queen's Counsel, Sir John A. Macdonald advised the Governor General to request the opinion of the Law Officers of the Crown for guidance in the matter "as the matter affects Her Majesty's prerogative". He said:

> The undersigned is of opinion that, as a matter of course, Her Majesty has directly, as well as through her representative the Governor General, the power of selecting from the bars of the several Provinces, her own counsel, and, as *fons honoris*, of giving them such precedence and preaudience in her Courts as she thinks proper.
>
> It is held by some that Lieutenant Governors of the Provinces, as they are now not appointed directly by Her Majesty, but by the Governor-General, under *The British North America Act, 1867*, clause 58, do not represent Her sufficiently to exercise the Royal prerogative without positive statutory enactment.
>
> This seems to be the view of Her Majesty's Government in 1864, when they refused to confer the pardoning powers on the Lieutenant Governors (96).

To which the Earl of Kimberley replied to the Governor General, Lord Lisgar:

> . . . with regard to the power of appointing Queen's Counsel in the Provinces forming the Dominion.
>
> I am advised that the Governor General has now power, as Her Majesty's representative, to appoint Queen's counsel, but that a Lieutenant Governor, appointed since the Union came into effect, has no such power of appointment (97).

Finally, in 1869, Sir John A. Macdonald, in commenting on a reserved New Brunswick bill providing for the issue of marriage licences by the Lieutenant-Governor in Council, denied that the legislature could invest the Lieutenant-Governor with this prerogative power. He said:

> that the power rests with the Governor General, under his commission and not with the Lieutenant Governors. They do not hold their appointment directly from the Queen, but are appointed by the Governor General in Council pursuant to the 58th section of the Act. Their powers are simply those conferred upon them by statute and they have no right to deal with matters of prerogative as representative of the Sovereign (98).

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(94) Despatch of Sir John A. Macdonald dated Dec. 21st, 1868. *Can. Sess. Pap.* 1869, No. 16, at p. 2.
(95) *Can. Sess. Pap.*, 1869, No. 16, at p. 5.
(96) *Can. Sess. Pap.*, 1873, No. 50, at p. 2.
(97) *Ibid.*, at p. 3.
(98) *Can. Sess. Pap.*, 1877, No. 89, at p. 342; in this view the Secretary of State for the Colonies concurred—*ibid*, at p. 339.

The leading judicial expression on the point in the period immediately after Confederation was the *Great Seal Case* (99). The question before the court was whether the legislature of Nova Scotia had the power to pass an Act conferring on the Lieutenant-Governor the prerogative power of appointing Queen's Counsel and granting precedence at the provincial Bar. Three of the judges held that the *British North America Act* had not invested the provinces with such power and the Act was *ultra vires* (100). In the course of his judgment, Taschereau J., said:

> Indeed, there is not a single clause, a single word of the *British North America Act* upon which it can be seriously contended that the Lieutenant-Governors are vested with Her Majesty's prerogative rights of confering such honours and dignities. It cannot be under section 65 of the Act, which defines the powers of the Lieutenant-Governors. The purport of this section (which applies only to Quebec and Ontario) is to give them the powers previously vested in the Governors, or Lieutenant-Governors, under any Act of the Imperial Parliament, or any Act of Upper Canada, Lower Canada, or Canada, and the dignity of Queen's counsel does not exist in virtue of any such Act or Acts. It cannot be under section 58. . . . In fact nowhere in the Act, can a single expression be found to sustain the contention that the Lieutenant-Governor has such a power.

But, as already explained, the position of the Lieutenant-Governor has been greatly modified by the decision of the Judicial Committee of the Privy Council in the *Liquidators of the Maritime Bank* v. *Receiver General of New Brunswick* (101). Its effect on the exercise of the prerogative power must be observed together with some general holdings on the legislative and executive powers in the Dominion as a whole.

In 1912, the Judicial Committee of the Privy Council said:

> Now, there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld (102).

Further, the powers so conferred endowed the Parliament and the provincial legislatures, within their respective spheres, with "authority as plenary and as ample....as the Imperial Parliament in the plenitude of its power possesses and could bestow" (103). The judicial Committee the Privy Council more directly concerned itself with the distribution of the powers of government between the provinces and the Federal Government when it said, *In re Initiative and Referendum Act* (104)

> The scheme of the Act passed in 1867 was thus, not to weld the provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head. Within the limits of area and subjects, its local legislature, so long as the Imperial Parliament did not repeal its own Act conferring

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(99) *Lenoir* v. *Ritchie* (1879) 3 S.C.R. 575. The decision overruled the opinions of the judges of the Supreme Court of Nova Scotia, *Can. Sess. Pap.*, 1877, No. 86.

(100) *Ibid*, at p. 620.

(101) (1892) A.C. 437.

(102) *Attorney-General for Ontario v. Attorney General for Canada* (1912) A.C. 571, at p. 581. *British Coal Corporation* v. *the King* (1935) A.C. 500, at p. 517.

(103) *Hodge* v. *The Queen* (1883) 9 App. Cas. 117, at p. 132.

(104) (1919) A.C. 934, at p. 942. See also *Croft* v. *Dunphy* (1933) A.C. 157.

this status, was to be supreme, and had such powers as the Imperial Parliament possessed in the plenitude of its own freedom before it handed them over to the Dominion and the Provinces, in accordance with the scheme of distribution which it enacted in 1867.

Particular references to the prerogative powers which were conferred on the Canadian Parliament and the provincial legislatures were made in the following cases. In the *Maritime Bank v. The Queen* (105), the question was whether the Crown in right of Canada could use its prerogative for payment in priority to other creditors from the liquidators of an insolvent bank in New Brunswick. The Supreme Court of Canada held in the affirmative with one dissenting voice (106). The majority of the Court followed the decision of *The Queen v. The Bank of Nova Scotia* (107). In this case, in which the right of the Crown to assert its prerogative of priority of payment over ordinary creditors in the insolvency of a Prince Edward Island bank was upheld, Chief Justice Ritchie said:

> I do not think there can be a doubt that the Crown is entitled at common law to a preference in a case such as this, for when the rights of the Crown come in conflict with the right of a subject in respect to the payment of debts in equal degree, the right of the Crown must prevail, and the Queen's prerogative in this respect, in this Dominion of Canada, is as exclusive as it is in England, the Queen's rights and prerogative extending to the colonies in like manner as they do to the mother country.

Strong, J., upheld the prerogative of the Crown in the province in these terms:

> I deny, however, that there is anything in the Imperial legislation of 1867 warranting the least inference or argument that any rights which the Crown possessed at the date of Confederation, in any province becoming a member of the dominion were intended to be in the slightest degree affected by the statute; it is true, that the prerogative rights of the Crown were by the statute apportioned between the provinces and the dominion, but this apportionment in no "sense implies the extinguishment of any of them, and they therefore continue to subsist in their integrity, however their locality might be altered by the division of power contained in the new constitutional law".
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> . . . . . .
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> that, for the purpose of entitling itself to the benefit of its prerogative rights, the Crown is to be considered one and indivisible throughout the Empire, and is not to be considered as a quasi-corporate head of several distinct bodies politic (thus distinguishing the rights and privileges of the Crown as the head of government of the United Kingdom from those of the Crown as head of the Government of the dominion, and, again, distinguishing in its relations to the Dominion and to the several provinces of the dominion) is a point so settled by authority as to be beyond controversy.

Finally, the Judicial Committee laid down the oft-quoted proposition respecting the position and power of the Lieutenant-Governor of a province in the *Liquidators of the Maritime Bank v. Receiver General of New Brunswick* (108):

> The act of the Governor General and His Council in making the appointment is, within the meaning of the statute, the act of the Crown; and a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor General is for all purposes of Dominion Government.

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(105) (1888) 17 S.C.R. 657.

(106) Gwynne, J., who held that as the Crown could not claim its prerogative under legislation existing prior to Confederation in the Province of Canada, the Crown could not claim the prerogative in the other provinces.

(107) (1885) 11 S.C.R. 1, at pp. 10, 19-20.

(108) (1892) A.C. 437, at p. 443.

The conclusion from these authorities is that all the executive powers and prerogatives necessary for self-government exist in Canada. It has been asserted that by these authorities and the progress of Canadian autonomy, the Governor General can rightfully exercise in Canada, on the advice of his ministers, all such prerogatives of the Crown as are necessary for the conduct of the executive government of Canada (109). The change of constitutional status of Canada in the past few decades, as marked by such events as the Imperial Conferences of 1926, 1930, the *Statute of Westminster, 1931,* the enactment of the Canadian *Seal's Act* in 1939 and the change in the Letters Patent constituting the office of the Governor General may well establish the proposition. But these arguments are hardly available with respect to the position of the Lieutenant-Governor (110) and, it is submitted, the determination of his prerogative powers are unaffected by these or other constitutional events. Their exercise would appear to rest, therefore, on the application of the following three principles:

(*a*) The prerogative powers of the Lieutenant-Governor are limited to those contained in his commission or instructions or any relevant statute.

(*b*) Executive and thus prerogative power follows the grant of legislative power.

(*c*) The Lieutenant-Governor is vested with all the prerogatives, *virtute officii,* capable of being exercised in relation to the government of the province.

(*a*) *The prerogative powers of the Lieutenant-Governor are limited to those contained in his commission or instructions or the terms of any relevant statute.*

This proposition is well-established by judgments of the Judicial Committee of the Privy Council. In *Attorney General of Canada v. Cain* (111), their Lordships' judgment was to the effect that on the cession of Canada to Great Britain in 1763, the Crown in England became possessed of all legislative and executive powers within the country so ceded to it and except so far as it has since parted with those powers by legislation, royal proclamation, or voluntary grant, it is still possessed of them. The British Government (and Parliament) might delegate those powers to the Governor or Government of one of the colonies either by a royal proclamation, which has the force of a statute, or by a statute of the British Parliament or by statute of a local Parliament to which the Crown has assented. If this delegation has taken place, the depository or depositories of the executive and legislative powers and authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown itself could have exercised them.

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(109) See, for example, O'Connor, *Report to the Senate on the British North America Act,* at pp. 145ff.

(110) See, for example, judgment of Duff, C. J., in *Labour Convention Case* (1936) S.C.R. 461; *infra* at p. 35.

(111) (1906) A.C. 542.

In *Musgrave v. Pulido* (112), the Judicial Committee of the Privy Council held:

> . . . it is apparent from these authorities that the Governor of a colony (in ordinary cases) cannot be regarded as a Viceroy; nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission and limited to the powers thereby expressly or impliedly entrusted to him.

Finally, LeFroy says:

> Under the general practice throughout the Empire, "the Queen", as Sir W. Anson says in his recent work on the Crown, "is represented in each colony by a governor, who is appointed by commission, and who is limited as to his powers by letters patent which constitute his office, and the instructions which inform him in detail of the manner in which his duties are to be fulfilled", and in the case of the Governor General, and of the provincial Lieutenant-Governors also, we should look to their commissions and instructions to see with what prerogative powers they have been invested (113).

But, as the Judicial Committee of the Privy Council explained in *Bonanza Creek Gold Mining Company v. The King* (114), this is not the only source of executive power in "a self-governing Dominion like Canada". The Board said:

> in *Musgrave and Pulido,* where it was laid down that, in the case of a Crown Colony, the commission of the Governor must in each case be the measure of executive authority, a principle which, in such a case as that of a self-governing Dominion like Canada, might find its analogy in the terms not only of the commission but of the statute creating the Constitution.

Thus the terms of "the statute creating the constitution" must be considered. There are several provisions of the *British North America Act* in which the Lieutenant-Governor's power to exercise the prerogative is expressly recognized. Section 63 provides that the "Executive Council of Ontario and Quebec shall be composed of such Persons as the Lieutenant-Governor from Time to Time thinks fit". By section 72 the Lieutenant-Governor of Quebec is authorized to appoint legislative councillors in the Sovereign's name. Section 82 empowers the Lieutenant-Governors, in the Sovereign's name, to summon the legislatures of Ontario and Quebec.

By necessary implication, other prerogatives may be found in the Act. The Judicial Committee of the Privy Council has held, in three cases, that the prerogatives of the Crown in the province, in relation to territorial revenues, are reserved to the provinces by virtue of sections 109 of the *British North America Act.* These include the right to escheat (115), the right to precious metals (116) and the right to *bona vacantia* (117).

Similarly, authority to dispense with the prerogative powers must be found in an Imperial Act either by express terms or necessary intendment (118). For example, the power to abrogate the prerogative of appeals in civil cases to the Judicial Committee was found to be vested

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(112) (1879) 5 App. Cas. 102.

(113) *Legislative Power in Canada,* at pp. 110-11. See also Todd, *Parliamentary Government in the British Colonies,* at p. 36.

(114) (1916) 1 A.C. 566 at pp. 585-86.

(115) *Attorney General of Ontario* v. *Mercer* (1883) 8 App. Cas. 767.

(116) *Attorney General of British Columbia* v. *Attorney General of Canada* (1888) 14 App. Cas. 295.

(117) *The King* v. *Attorney General of British Columbia* (1924) A.C. 213.

(118) *British Coal Corporation* v. *The King* (1935) A.C. 500, at p. 519.

in the Canadian Parliament under section 101 and overrode any power conferred by section 92 on the provinces or preserved by section 129 to affect this prerogative (119).

(b) *Executive and thus prerogative power follows the grant of legislative power.*

Another well-established principle under which the Lieutenant-Governors may exercise the prerogative is that, under the *British North America Act, 1867*, the distribution of the executive authority follows the distribution under the Act of legislative authority, so that the two kinds of authority are correlative. Thus in *Bonanza Creek Gold Mining Co. Ltd. v. The King* (120), referring to sections 12, 64 and 65, their Lordships said:

> The effect of these sections of the *British North America Act* is that, subject to certain express provisions in that Act and to the supreme authority of the Sovereign, who delegates to the Governor General and through his instrumentality to the Lieutenant-Governors the exercise of the prerogative on terms defined in their commissions, the distribution under the new grant of executive authority in substance follows the distribution under the new grant of legislative powers.

For instance, it has been held that the provincial legislature can properly confer power on the Lieutenant-Governor to pardon offences against provincial legislation (121). Again, it was held in the *Queen's Council Case* (122) that the legislature of Ontario had full power to confer upon the Lieutenant-Governor the right to appoint Queen's Counsel, and to regulate precedence at the Bar, by virtue of its legislative authority to amend the constitution (section 92(1)), appoint officers (section 92(4)), and to regulate administration of justice in the province (section 92(14)).

Another illustration is the *Great Seal Case* (123), where the Judges of the Supreme Court of Nova Scotia, in 1877, pointed out that Her Majesty in assenting (through the Governor General) to certain provincial Acts authorizing "Her Lieutenant-Governor" to exercise her right in the use of the Great Seal in and for the province—"to the extent in which it is necessarily conferred on that high officer by the statute"—did expressly delegate to and empower Lieutenant-Governors to exercise certain prerogative rights appropriate to the office of the representative of the Sovereign in the particular province.

Under this principle of devolution of executive power, the question has arisen whether the province has the executive power to enter international agreements with other states. The argument of the provinces is, of course, that as the provinces have the legislative power to implement treaty obligations, they should have the executive power to enter into them. This argument is unsound. As early as 1910 it appears that the courts have regarded treaties as a matter for the attention of the

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(119) *Attorney General for Ontario* v. *Attorney General for Canada* (1947) A.C. 127.
(120) (1916) 1 A.C. 566.
(121) *Attorney General for Canada* v. *Attorney General for Ontario* (1894), 23 S.C.R. 458; affirming (1893) 19 O.A.R. 31 and (1891) 20 O.R. 222.
(122) *Attorney General for the Dominion of Canada* v. *The Attorney General for the Province of Ontario* (1898) A.C. 247.
(123) *Can. Sess. Pap.*, 1877, No. 86. Todd's *Parliamentary Government in the British Colonies*, at p. 596.

Canadian Government only. In this connection the Judicial Committee of the Privy Council in *Dominion of Canada v. The Province of Ontario* (124) said:

> The Crown acts on the advice of ministers in making treaties, and in owning public lands holds them for the good of the community. When differences arise between the two governments in regard to what is due to the Crown as maker of treaties from the Crown as owner of public lands they must be adjusted as though the two governments were separately invested by the Crown with its rights and responsibilities as treaty maker and as owner respectively.
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> So regarding it, there does not appear sufficient ground for saying that the Dominion Government in advising the treaty did so as agent for the province. They acted with a view to great national interests, in pursuance of powers derived from the Act of 1867, without the consent of the province and in the belief that the lands were not within that province. They neither had nor thought they required nor purported to act upon any authority from the Provincial Government.

In the recent *Labour Conventions Case* (125), in the Supreme Court of Canada, it was argued by the provinces concerned that the Governor General in Council lacked the power to enter into an agreement on behalf of the Government of Canada that is internationally binding in respect of a subject matter that is wholly or in part within the exclusive jurisdiction of the provinces. This would imply either that only the provinces can conclude such agreements or that no Canadian authority has the power to bind Canada internationally in these matters. Chief Justice Duff answered this contention by referring to the change of status of Canada since the time of the *British North America Act, 1867*, by which, as a result of Canada having attained internationl status and because of the "crystallization of constitutional usage into a rule of constitutional law", Canada had acquired the power to enter into international treaties. This change of status was not suggested insofar as the provinces were concerned and none of the reasoning of the Chief Justice in this respect would apply to any of the provinces of Canada. The learned Chief Justice supported his conclusion by observing that ratifications of international instruments have been recognized as internationally binding on Canada by the decision of the Judicial Committee of the Privy Council in the *Radio Case* (126). He said (127):

> Ratification was the effective act which gave binding force to the convention. It was, as respects Canada, the act of the Government of Canada alone and the decision mentioned appears, therefore, to negative decisively the contention, that, in point of strict law, the Government of Canada is incompetent to enter into an international engagement.

Rinfret, J., conceded that the executive power is in the Federal Government when he said (128):

> Let it be granted that under the scheme of the *British North America Act* the provinces were "federally united into one Dominion"; that the Act provides for one nation, not several nations; that the provinces have no status in international law, they are not states and not recognized as such.

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(124) (1910) A.C. 637, at p. 645.
(125) (1936) S.C.R. 461.
(126) (1932) A.C. 304.
(127) *Ibid*, at p. 478.
(128) *Ibid*, at p. 510.

> Let it be conceded from these premises that the Government of Canada is the proper medium for all international relations and "that for international purposes, it should be regarded as a unity". . . .

But he continues (129):

> I consider it to be within the clear spirit of the *British North America Act* that the obligation should not be created or entered into before the provinces have given their consent thereto.

Cannon, J., assumes the executive power to be in the Parliament of Canada when he says (130):

> These are some of the reasons why foreign powers, when dealing with Canada, must always keep in mind that neither the Governor General in Council, nor Parliament, can in any way, and specifically by an agreement with a foreign power, change the constitution of Canada or take away from the provinces their competency to deal exclusively with the enumerated subjects of section 92.

Crockett, J., is of the same opinion with respect to the exercise of the executive power. He says (131):

> While I agree with the Learned Chief Justice that the government of Canada must now be held to be the proper medium for the formal conclusion of international conventions, whether they affect the Dominion as a whole or any of the provinces separately, I do not think that this fact can be relied on as altering in any way the provisions of the B.N.A. Act as regards the distribution of legislative power as between the Dominion Parliament and the provincial legislatures. . . .

On appeal to the Judicial Committee of the Privy Council, their Lordships probably considered the argument of no merit for discussion. Although the Board decided that legislative power to implement international agreements followed the grant of power in the *British North America Act,* they inferentially held the executive power to be in the Federal Government when it held (132):

> It follows from what has been said that no further legislative competence is obtained by the Dominion from its accession to international status and by the consequent increase in the scope of its executive functions.

(c) *The Lieutenant-Governor is vested with all the prerogatives, virtute officii, capable of being exercised in relation to the government of a province.*

A third principle has been advocated as a basis for valid exercise of executive power by the Lieutenant-Governor. This theory is expressed in the view that the Lieutenant-Governor is entitled, *virtute officii,* and without express statutory enactment, to exercise all prerogatives incident to executive authority in matters over which provincial legislatures have jurisdiction, as the Governor General is entitled, *virtute officii,* and without any statutory enactment, to exercise all prerogatives incident to executive authority in matters within the jurisdiction of the Parliament. This observation may well be true with respect to the Governor General

(129) *Ibid,* at p. 511.
(130) *Ibid,* at p. 522.
(131) *Ibid,* at p. 535.
(132) (1937) A.C. 326, at p. 352

for the reasons already stated (133) but it is of dubious validity with respect to the Lieutenant-Governors.

The argument was brought up before the Judicial Committee of the Privy Council in *Bonanza Creek Gold Mining Co. Ltd. v. The King* (134). Their Lordships said:

> But their Lordships abstain from discussing at length the question so raised. They will only say that when if ever, it comes to be argued, points of difficulty will have to be considered. There is no provision in the *British North America Act* corresponding even to Section 61 of the *Australian Commonwealth Act*, which, subject to the declaration of the discretionary right of delegation by the Sovereign in chapter 1, s. 2 provides that the executive power, though declared to be in the Sovereign, is yet to be exercisable by the Governor General. Moreover, in the Canadian Act there are various significant sections, such as s. 9, which declares the executive government and authority over Canada to continue and be vested in the Sovereign; s. 14, which declares the power of the Sovereign to authorize the Governor General to appoint deputies; s. 15, which, differing from s. 68 of the *Commonwealth Act*, says that the command in chief of the naval and military forces in Canada is to be deemed to continue and be vested in the Sovereign; and s. 16, which says that, until the Sovereign otherwise directs, the seat of Government in Canada shall be in Ottawa. These and other provisions of the *British North America Act* appear to preserve prerogative rights of the Crown which would pass if the scheme were that contended for, and to negative the theory that the Governor-General is made a viceroy in the full sense, and they point to the different conclusion that for the measure of his powers the words of his commission and of the statute itself must be looked to. In the case of the *Liquidators of the Maritime Bank of Canada* v. *Receiver General of New Brunswick* (1892) A.C. 437, already referred to, it was said by this Board that the provisions of the Act "nowhere profess to curtail in any respect the rights and privileges of the Crown or to disturb the relations then subsisting between the Sovereign and the provinces". Properly understood, and subject to such express provisions of the Act as transfer what would otherwise remain prerogative powers, their Lordships are disposed to agree with this interpretation. It is quite consistent with it to hold that executive power is in many situations which arise under the statutory Constitution of Canada conferred by implication in the grant of legislative power, so that where such situations arise the two kinds of authority are correlative. It follows that to this extent the Crown is bound and the prerogative affected. But such a conclusion is a very different one from the far-reaching principle contended for in the argument in question.

In the result, although it may well be that the prerogative powers of the Governor General have been changed by the progress of Canada's autonomy, it is submitted that the executive power of the Lieutenant-Governors has not been affected, but is controlled by the two principles (a) and (b).

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(133) *Supra*, at p. 32. See also O'Connor, *Report to the Senate on the British North America Act*, at p. 156. Also Keith, *Constitutional Law of the British Dominions* (1933), at p. 137:

> "It is necessary to make it clear that the King delegates to the Governor the prerogative in so far as that is proper for the exercise in a Dominion. This issue unquestionably has been affected by the progress of Dominion autonomy. Formerly the extent of the delegation of the prerogative in the case of the Dominion had to be judged on the basis of their subordinate position; now that equality of status has been asserted it may be argued that *prima facie* every royal prerogative has by necessary intendment passed to the Governor General. . . . In all probability, however, without special delegation there may be held to be implicit in the office of the Governor General all such prerogatives as are necessary for the government of the territory concerned. . . ."

LeFroy, *Legislative Power in Canada*, at pp. 111ff, wherein he considered the *Pardoning Power Case* (*Attorney General of Canada* v. *The Attorney General of Ontario* (1891) 20 O.R. 222; (1893) 19 O.A.R. 31; (1894) 23 S.C.R. 458) and the arguments of Mr. Edward Blake in support of this view.

(134) (1916) 1 A.C. 566, at p. 586.

APPENDIX A

Sections of the British North America Act, 1867, pertaining to the Office of the Lieutenant-Governor

9. The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.

10. The Provisions of this Act referring to the Governor General extend and apply to the Governor General for the Time being of Canada, or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of Canada on behalf and in the Name of the Queen, by whatever Title he is designated.

11. There shall be a Council to aid and advise in the Government of Canada, to be styled the Queen's Privy Council for Canada; and the Persons who are to be Members of that Council shall be from Time to Time chosen and summoned by the Governor General and sworn in as Privy Councillors, and Members thereof may be from Time to Time removed by the Governor General.

13. The Provisions of this Act referring to the Governor General in Council shall be construed as referring to the Governor General acting by and with the Advice of the Queen's Privy Council for Canada.

55. Where a Bill passed by the Houses of the Parliament is presented to the Governor General for the Queen's Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to Her Majesty's Instructions, either that he assents thereto in the Queen's Name, or that he withholds the Queen's Assent, or that he reserves the Bill for the Signification of the Queen's Pleasure.

56. Where the Governor General assents to a Bill in the Queen's Name, he shall by the first convenient Opportunity send an authentic Copy of the Act to one of Her Majesty's Principal Secretaries of State, and if the Queen in Council within Two Years after Receipt thereof by the Secretary of State thinks fit to disallow the Act, such Disallowance (with a Certificate of the Secretary of State of the Day on which the Act was received by him) being signified by the Governor General, by Speech or Message to each of the Houses of the Parliament or by Proclamation, shall annul the Act from and after the Day of such Signification.

57. A Bill reserved for the Signification of the Queen's Pleasure shall not have any Force unless and until, within Two Years from the Day on which it was presented to the Governor General for the Queen's Assent, the Governor General signifies, by Speech or Message to each of the House of the Parliament or by the Proclamation, that it has received the Assent of the Queen in Council.

An Entry of every such Speech, Message, or Proclamation shall be made in the Journal of each House, and a Duplicate thereof duly attested shall be delivered to the proper Officer to be kept among the Records of Canada.

58. For each Province there shall be an Officer, styled the Lieutenant Governor, appointed by the Governor General in Council by Instrument under the Great Seal of Canada.

59. A Lieutenant Governor shall hold Office during the Pleasure of the Governor General; but any Lieutenant Governor appointed after the Commencement of the First Session of the Parliament of Canada shall not be removable within Five Years from his Appointment, except for Cause assigned, which shall be communicated to him in Writing within One Month after the Order for his Removal is made, and shall be communicated by Message to the Senate and to the House of Commons within One Week thereafter if the Parliament is then sitting, and if not then within One Week after the Commencement of the next Session of the Parliament.

60. The Salaries of the Lieutenant Governors shall be fixed and provided by the Parliament of Canada.

61. Every Lieutenant Governor shall, before assuming the Duties of his Office, make and subscribe before the Governor General or some Person authorized by him Oaths of Allegiance and Office similar to those taken by the Governor General.

62. The Provisions of this Act referring to the Lieutenant Governor extend and apply to the Lieutenant Governor for the Time being of each Province, or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of the Province, by whatever Title he is designated.

63. The Executive Council of Ontario and of Quebec shall be composed of such Persons as the Lieutenant Governor from Time to Time thinks fit, and in the first instance of the following Officers, namely,—the Attorney General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, within Quebec the Speaker of the Legislative Council and the Solicitor General.

64. The Constitution of the Executive Authority in each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act.

65. All Powers, Authorities, and Functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, or Canada, were or are before or at the Union vested in or exerciseable by the respective Governors or Lieutenant Governors of those Provinces, with the Advice or with the Advice and Consent of the respective Executive Councils thereof, or in conjunction with those councils or with any Number of Members thereof, or by those Governors or Lieutenant Governors individually, shall, as far as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec respectively, be vested in and shall or may be exercised by the Lieutenant Governor of Ontario and Quebec respectively, with the Advice or with the Advice and Consent of or in conjunction with the respective Executive Councils, or any Members thereof, or by the Lieutenant Governor individually, as the Case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be abolished or altered by the respective Legislatures of Ontario and Quebec.

66. The Provisions of this Act referring to the Lieutenant Governor in Council shall be construed as referring to the Lieutenant Governor of the Province acting by and with the Advice of the Executive Council thereof.

67. The Governor General in Council may from Time to Time appoint an Administrator to execute the Office and Functions of Lieutenant Governor during his Absence, Illness, or other Inability.

69. There shall be a Legislature for Ontario consisting of the Lieutenant Governor and of One House, styled the Legislative Assembly of Ontario.

71. There shall be a Legislature for Quebec consisting of the Lieutenant Governor and of Two Houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec.

72. The Legislative Council of Quebec shall be composed of Twenty-four Members, to be appointed by the Lieutenant Governor, in the Queen's Name, by Instrument under the Great Seal of Quebec, One being appointed to represent each of the Twenty-four Electoral Divisions of Lower Canada in this Act referred to, and each holding Office for the Term of his Life, unless the Legislature of Quebec otherwise provides under the Provisions of this Act.

75. When a Vacancy happens in the Legislative Council of Quebec by Resignation, Death, or otherwise, the Lieutenant Governor, in the Queen's Name, by Instrument under the Great Seal of Quebec, shall appoint a fit and qualified Person to fill the Vacancy.

77. The Lieutenant Governor may from Time to Time, by Instrument under the Great Seal of Quebec, appoint a Member of the Legislative Council of Quebec to be Speaker thereof, and may remove him and appoint another in his Stead.

82. The Lieutenant Governor of Ontario and of Quebec shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of the Province, summon and call together the Legislative Assembly of the Province.

89. Each of the Lieutenant Governors of Ontario Quebec and Nova Scotia shall cause Writs to be issued for the First Election of Members of the Legislative Assembly thereof in such Form and by such Person as he thinks fit, and at such Time and addressed to such Returning Officer as the Governor General directs, and so that the First Election of Member of Assembly for any Electoral District or any Subdivision thereof shall be held at the same Time and at the same Places as the Election for a Member to serve in the House of Commons of Canada for that Electoral District.

90. The following Provisions of this Act respecting the Parliament of Canada, namely,—the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved,—shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,—

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licenses in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes:—
    (*a*) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
    (*b*) Lines of Steam Ships between the Province and any British or Foreign Country:
    (*c*) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
11. The Incorporation of Companies with Provincial Objects.
12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
16. Generally all Matters of a merely local or private Nature in the Province.

APPENDIX B

The Form of Commission of the Lieutenant-Governor

KNOW YOU, that We, reposing special trust and confidence in the prudence, courage, loyalty, integrity and ability of you the said ....., have, by and with the advice of Our Privy Council for Canada, thought fit to constitute and appoint, and We do hereby constitute and appoint you the said ....., to be the Lieutenant-Governor in and over the Province of ....., one of the Provinces of Canada, during the will and pleasure of Our Governor General of Canada.

And We do hereby authorize and empower and command you the said ..... in due manner to do and execute all things that shall belong to your said command and the trust We have reposed in you, according to the several powers, provisions and directions granted or appointed you by virtue of the Act of the Parliament of the United Kingdom of Great Britain and Ireland, passed in the thirtieth year of Her late Majesty's Reign, called and known as *"British North America Act, 1867,"* and of all other statutes in that behalf and of this Our Present Commission, according to such instructions as are herewith given to you *and hereunto annexed* or which may from time to time be given to you, in respect of the said Province of ..... under the sign manual of Our Governor General of Canada or by Order of Our Privy Council for Canada, and according to such laws as are or may be in force within the said Province of .....

And We do hereby further appoint that so soon as you shall have taken the prescribed oaths and entered upon the duties of your office, this Our Present Commission shall supersede Our Commission under the Great Seal of Canada, bearing date ....., day of ....., one thousand nine hundred and ....., appointing ..... to be the Lieutenant-Governor of the said Province of.....

In Testimony whereof We have caused these Our Letters to be made Patent and the Great Seal of Canada to be hereunto affixed.

WITNESS, Etc., Etc.

At Our Government House in Our City of Ottawa, this ..... day of ..... in the year of Our Lord one thousand nine hundred and ..... and in the ..... year of Our Reign .....

APPENDIX C

The Form of Instructions to the Lieutenant-Governors

WHEREAS it is enacted in and by *"The British North America Act, 1867"*, that for each Province there shall be an Officer, styled the Lieutenant-Governor, appointed by the Governor General in Council by instrument under the Great Seal of Canada; and whereas, by and with the advice of the Queen's Privy Council for Canada, I have, by Commission under the Great Seal of Canada, constituted and appointed .....
to be Lieutenant-Governor in and over the said Province of.....
one of the Provinces of Canada, and thereby authorized and empowered and commanded him in due manner, to do and execute all things belonging to his said command and trust according to the several powers, provisions and directions granted or appointed to him by virtue of the said Act, and of all other Statutes in that behalf, and of the said Commission, according to such instructions as were with the said Commission given unto him, or which might, from time to time, be given to him in respect to the said Province of .....,
under my Sign Manual or by order of the Queen's Privy Council for Canada, and according to such laws as are or may be in force within the said Province of .....

I. Now, therefore, I do by these my Instructions under my Sign Manual, by and with the advice of the Queen's Privy Council for Canada, declare my pleasure to be that the Lieutenant-Governor of the Province of.....
for the time being, shall, with all due solemnity, cause the said Commission under the Great Seal of Canada, appointing him Lieutenant-Governor, to be read and published in the presence of the Chief Justice for the time being or other Judge of the Supreme Court (*or, as the case may be*) of the said Province and of the members of the Executive Council in the said Province.

II. And I do further declare my pleasure to be the Lieutenant-Governor and every other officer appointed to administer the Government of the said Province, shall take the oath of allegiance in the form provided by the said Act, and likewise that he or they shall take the usual oaths for the due execution of the office of Lieutenant-Governor, which oaths the said Chief Justice for the time being of the said Province (*or Court, as the case may be*), or in his absence, or in the event of his being otherwise incapacitated any Judge of the Supreme Court (*or other Court, as the case may be*) of the said Province, or in the case of emergency any one duly commissioned by me, shall and is hereby required to tender or administer unto him or them.

III. And I do authorize and require the Lieutenant-Governor, from time to time, to administer to all and every person or persons, to whom he is by the said Act directed to administer the same, the said oath of allegiance and generally to administer such other oath or oaths as he lawfully may, and as may from time to time be prescribed by any Laws or Statutes in that behalf provided.

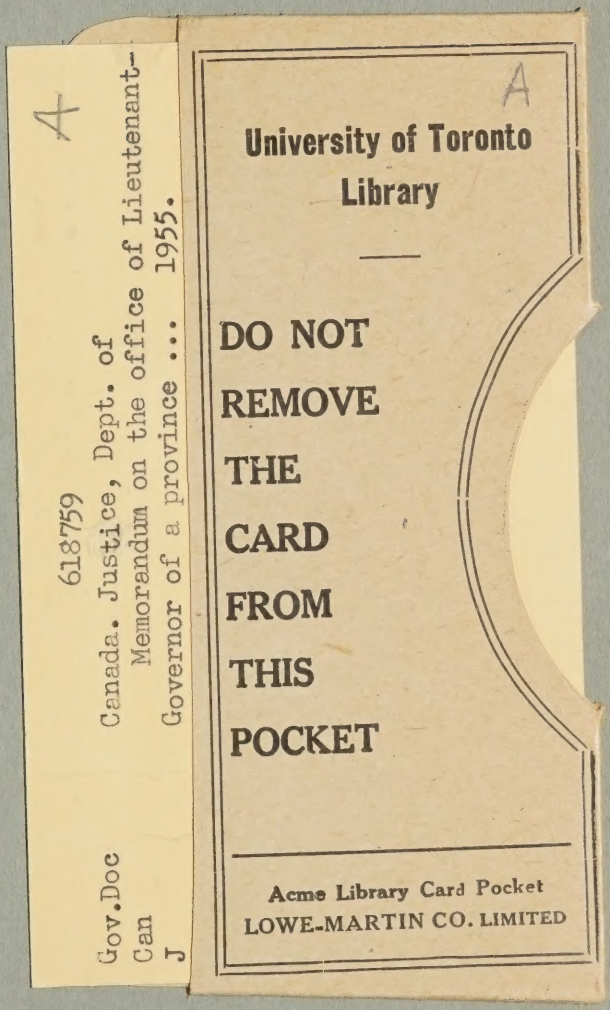
IV. The Lieutenant-Governor is to take care that all Laws assented to by him in my name, or reserved for signification of my pleasure thereon, shall, when transmitted by him, be fairly abstracted in the margin, and be accompanied in such cases as may seem to him necessary, with such explanatory observations as may be required to exhibit the reasons and occasions for proposing such laws.

V. The Lieutenant-Governor shall, within ten days after the prorogation of the Legislature or after adjournment of the Legislature for a period of more than ten days or for an indefinite period, send an authentic copy of each Act to which he has assented during the session of the Legislature or during the session of the Legislature prior to the commencement of the adjournment, as the case may be, to the Secretary of State of Canada.

VI. The Lieutenant-Governor, on receipt of a copy of an Order in Council disallowing an Act with my certificate of the date on which the Act was received by me, shall forthwith make proclamation in the said Province of such certificate, and of the disallowance of the said Act.

VII. The Lieutenant-Governor shall not quit the Province without having first obtained leave from me for so doing, under my Sign Manual, or through the Secretary of State of Canada.

EDMOND CLOUTIER, C.M.G., O.A., D.S.P.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1955.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